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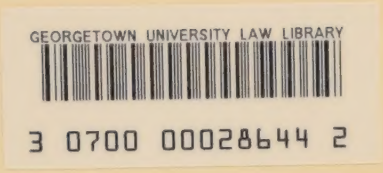
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SUNDERLIN

ON

Automobile Insurance

INCLUDING

FIRE INSURANCE
THEFT INSURANCE
COLLISION INSURANCE
CONVERSION OR EMBEZZLEMENT INSURANCE
TRANSPORTATION INSURANCE
PUBLIC LIABILITY INSURANCE
PROPERTY DAMAGE INSURANCE

AS APPLICABLE TO AUTOMOBILES

BY

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In Memory

of

My Father and Mother

ARTHUR VAUGHN and JENNIE COFFIN SUNDERLIN

As a token of my immortal love and affection

This Book is Dedicated

PREFACE.

During the past decade and a half we have witnessed the rise and growth of one of the nation's greatest industries, that of the automobile, and concurrently, there has developed the underwriting of automobile losses in the form of fire, theft, collision, public liability, property damage, and other kinds of insurance. With the more recent passage of laws by many of the states for compulsory automobile insurance, or laws that will indirectly require the automobile owner to take out liability insurance as a matter of self-protection, we may reasonably expect that the growing public demand for financial protection against damages resulting from the negligent operation of automobiles by irresponsible owners or operators will ultimately result in automobiles being generally covered with liability, if not by all kinds of insurance. The increasing importance of the subject of automobile insurance and the law pertaining thereto is self-evident.

It is believed that this work is timely, and will prove invaluable to the legal and insurance world. The law of automobile insurance is a creation, mainly, of the past decade of judicial decisions and statutory enactments. Heretofore, the subject has been involved or included with that of automobile law or insurance law generally. It has not, in other words, received the special consideration that the importance of the subject requires. The law of insurance, generally speaking, requires special legal understanding; but, each branch of the law of insurance, such as life, fire, marine, compensation and automobile, is a special field of the law by itself. Knowledge of any special one of these branches is of little advantage when it comes to exactitude of understanding of the law as it applies to any of the others. Thus, the law of automobile insurance requires particular understanding of the applica-

tion of the principles of the law of insurance to automobile insurance cases, and knowledge of the rules of law therein applied. Special knowledge and understanding is necessary of the decisions of the courts in the construction and interpretation of the various forms and kinds of automobile insurance coverage.

Part I of this work treats of subjects and principles that are common to all kinds of automobile insurance. Part II considers the special lines of automobile insurance, such as fire, theft, collision, conversion or embezzlement insurance, public liability and property damage and the principles of law appertaining thereto.

In this volume the effort has been to review and analyze substantially all American and many Canadian and English cases on the subject, including sufficient of the facts with the principles and rules of law so that reference to the decisions will not generally be required. Having in mind the utility of a text book in the economy of time, the head-notes have been prepared in such manner as to permit the reader to ascertain and grasp readily the principles and rules of law enunciated.

CHARLES A. SUNDERLIN.

Los Angeles, California,
October, 1929.

TABLE OF CONTENTS.

PART ONE

MATTERS COMMON TO ALL FORMS OF AUTOMOBILE INSURANCE.

CHAPTER I.

STATE REGULATION.

SECTION.

1. In general.
2. Insurance corporations creatures of law.
3. Individuals may conduct insurance business.
4. Power of state.
5. Admission of foreign companies.
6. Automobile insurance.
7. Compulsory motor vehicle insurance acts.
8. (a) Massachusetts.
9. (b) New Hampshire.
10. (c) Connecticut.
11. Motor vehicle acts—Iowa, New York, California.
12. Statutory enactments.
13. Standard form policy.
14. Taxation.
15. Reserve.

CHAPTER II.

INSURABLE INTEREST.

16. In general.
17. What is an insurable interest.
18. When insurable interest must exist.
19. Contract of indemnity.
20. Statutory requirements.
21. Bill of sale.
22. Conditional sales.
23. Mortgagor and mortgagee.
24. Stolen car insured.

CHAPTER III.

CONSTRUCTION OF THE POLICY.

SECTION.
25. Rules of construction.—In general.
26. Intention of parties.
27. Inconsistent provisions.
28. Forfeitures.
29. Failure to read policy.
30. Same—waiver.
31. Application.
32. Oral contracts.
33. (a) Consideration.
34. (b) Question of fact.
35. (c) Proof.
36. Parol evidence.
37. Binding slips.
38. Rider.
39. Illustrations. (a) Contradiction of policy.
40. (b) Recovery for collision damage.
41. (c) Miscellaneous.
42. Antedated transfer.
43. Renewal policy.
44. Acceptance.
45. Same—Contract of agent.
46. Correspondence.
47. Divisible contract.
48. For account of whom it may concern.
49. Assignment.
50. (a) Waiver.
51. (b) Right of action.
52. (c) Appeal and error.
53. Statute.
54. Same.—Statute of frauds.
55. What law governs.

CHAPTER IV.

AGENCY AND BROKERAGE.

(A) AGENCY

56. Agent defined.
57. Agent represents insurer.
58. Appointment.
59. Authority of agent.
60. Soliciting agent.

SECTION.
61. Local agent with limited authority.
62. Dealer as agent.
63. Same—Dealer acting without the scope of his employment.
64. Agent may act for insured.
65. Right of action.
66. Termination of agency.
67. Jury.
68. Statute.
69. Adjuster.
70. Authority limited by policy.
71. Illustrations. (a) Apparent authority.
72. (b) Special instructions.
73. (c) Ratification.
74. (d) Evidence.

(B) BROKERAGE

75. Broker defined.
76. In general.
77. Illustrations. (a) Binder
78. (b) Application made to broker.
79. (c) Assured liable for conduct of broker.
80. Oral agreement.
81. Broker as agent of insurer.
82. For collection of premium.
83. Jury.

CHAPTER V.

WAIVER AND ESTOPPEL.

84. Waiver and estoppel distinguished.
85. Federal rule.
86. Application.
87. Authority of agents.
88. Forfeitures.
89. Knowledge.
90. Same—Imputed.
91. Notice (a) In general.
92. (b) Intention to take out additional insurance.
93. (c) Information secured by general agent.
94. Soliciting agent has no authority to waive misrepresentation.
95. Exception—Soliciting agent with general powers.
96. Statutory policy.
97. Parol promise.
98. Gratuitous payment.
99. Unconditional ownership.
100. Same.
101. Transfer of title.

SECTION.
102. Chattel mortgage.
103. Evidence.
104. Jury.
105. Ratification—In general.
106. Cancellation.
107. Failure to cancel.

CHAPTER VI.

PREMIUM.

108. Payment.
109. Agency.
110. Return of unearned premium.
111. Waiver.
112. Pleading.
113. Evidence.

CHAPTER VII.

REPRESENTATIONS AND WARRANTIES

(A) IN GENERAL.

114. Misrepresentation.
115. Same—Fact material to risk—Definition.
116. Warranties.
117. Warranties and representations distinguished.
118. Construction.
119. Knowledge.
120. Unture statement not made by assured.
121. Open policy covering many cars.
122. Renewal.
123. Pleading.
124. Defense.
125. Evidence.
126. Misrepresentations to adjuster—Jury.
127. Instructions.
128. Same—Fraud.
129. Motion for judgment notwithstanding verdict.
130. Statute.

(B) DESCRIPTION—COST.

131. In general.
132. Illustrations.
133. Exchange value.
134. Same—Second-hand car.

SECTION.
135. Accessories.
136. Cost with equipment.
137. Conduct of the agent.
138. Overvaluation must be fraudulent.
139. Cost of financing.
140. Jury.
141. Inspection of insured car by insurer.
142. Valued policies.
143. Statute.

(C) MODEL.

144. In general.
145. Misrepresentation—New car.
146. Misrepresentation defeats recovery.
147. Insurable value.
148. Material fact.
149. Higher premium rate.
150. Where insurer would have rejected application.
151. Premium rate dependent upon year model.
152. Assured acting in good faith and insurer sharing responsibility.
153. Correct serial number but erroneous year model.
154. Correct number and type of car.
155. Good faith.
156. Failure of assured to read statement.
157. Where insured car is erroneously described by insurer on personal information of its agent.
158. Agent who examines car presumed to know model.
159. Where solicitor makes personal examination.
160. No intention to deceive.
161. Temporary use—Vexations refusal to pay.
162. Subsequent conversation.
163. Conduct.
164. Evidence—(a) Certificate of registration.
165. (b) Statute.
166. (c) Number and year model not identical.
167. (d) New or second-hand.
168. (e) Directed verdict held improper.
169. Jury. (a) Misdescription.
170. (b) Evidence.
171. (c) Same—Conflict.
172. (d) Meeting of minds even though description incorrect.
173. (e) Exchange value.
174. Estoppel—Husband and wife.
175. Appeal and error.

(D) NUMBER.

176. In general.
177. Matter of description.

SECTION.
178. Illustrations. (a) Correct number concealed without assured's knowledge.
179. (b) Identity.
180. Evidence. (a) Identity.
181. (b) Same—Defense.
182. (c) Examination by insurer's agent.
183. (d) Mistake.
184. Jury. In general.
185. Illustrations. (a) Identity.
186. (b) Good faith.
187. Judgment.

(E) PLACE OF KEEPING.

188. In general.
189. Location material—Factor in rate making.
190. Erroneous description.
191. Fraud or mistake.
192. Knowledge.
193. Same—Waiver.
194. Illustration—Private garage construed to cover addition to barn.
195. Miscellaneous—"When not in use the car shall be kept in a garage" construed.

(F) USE OF INSURED AUTOMOBILE.

196. In general.
197. Public policy.
198. Defined.
199. Misrepresentation—Intent to deceive immaterial.
200. Compensation.
201. Descriptive.
202. Promissory warranty.
203. Illustrations.
204. Temporary use suspends policy.
205. Mortgagor and mortgagee—As their interests may appear.
206. Pleading—Condition subsequent.

(G) OTHER INSURANCE.

207. In general.
208. General rule.
209. Exception.
210. Public policy.
211. Provision is reasonable.
212. Clause has no application to insurable interests not covered.
213. Illustrations. (a) Conditional sales contract—Master policy—Knowledge.
214. (b) Same—Buyer's interest voided.
215. Mortgagee.
216. Waiver.

CHAPTER VIII.

TITLE AND OWNERSHIP.

SECTION.
217. In general.
218. Encumbrances—In general.
219. (a) Theft policy.
220. (b) Additional mortgage.
221. (c) No inquiry by agent as to encumbrance.
222. (d) Notice.
223. (e) Void chattel mortgage.
224. (f) Encumbered after issuance of policy.
225. (g) Trust deed satisfied before loss.
226. (h) Statutory enactment. (h1) Prevails over policy provision.
227. (h2) Same—Right to defend.
228. (i) Promissory note for part of purchase price.
229. (j) Mortgage paid but not satisfied of record.
230. (k) Verbal agreement..
231. Forfeiture.
232. Change of interest, title or possession. (a) Reasonable and valid.
233. (b) Definition.
234. (c) What constitutes.
235. (d) Exchange.
236. (e) Decree of court.
237. (f) Statutory enactment.
238. Unconditional and sole owner. (a) Conditional sale purchaser.
239. (a1) Theft insurance.
240. (a2) When agreed to by insurer.
241. (a3) Dealer's agent.
242. (a4) Lease.
243. (b) Joint ownership for an intervening period.
244. (c) Husband and wife.
245. (d) Bill of sale—Delivery.
246. (e) "As their interests may appear".
247. (f) Statutes.
248. (g) Registration.
249. (h) Stolen car insured.
250. Waiver—Knowledge.
251. (a) Conditional sale contract.
252. (b) Joint ownership.
253. (c) Adjuster.
254. (d) Joint interests.
255. (e) Other interests.
256. (f) Return of premium.
257. (g) Request for payment.
258. Estoppel. (a) General rule.
259. (b) Knowledge of intention to encumber.
260. (c) Change of ownership.
261. (d) Inquiry.

SECTION.
262. Pleading.
263. Burden of proof. (a) Waiver.
264. (b) Chattel mortgage.
265. (c) Title.
266. (d) Purchase money notes.
267. Evidence. (a) Parol.
268. (a1) Contract of sale unsigned by seller.
269. (b) Proof of misrepresentation.
270. (c) Sufficiency.
271. (d) Ownership.
272. (e) Encumbrance—Knowledge.
273. (f) Finding.
274. Defense. (a) Agency.
275. (b) Statutory provision.
276. Instructions, (a) Unconditional ownership.
277. (b) Failure to call witness.
278. Jury. (a) In general.
279. (b) Conflict in evidence.
280. (c) Statute.
281. (d) Mortgage.
282. (e) Certificate as evidence of ownership.

CHAPTER IX.

RISKS AND CAUSES OF LOSSES.

283. Duration of risk.
284. Countersigning.
285. Identity of insured car.
286. Insured car driven contrary to law—Public policy.
287. Same—Registration—Unlicensed chauffeur.
288. Chattel mortgage creditor.
289. Value of car—Price reduced.
290. Partnership—Wilful burning.
291. Illegal transportation of liquor.
292. Contract not terminated by foreclosure.
293. Hazards not covered—Riot, civil commotion, etc.

CHAPTER X.

MORTGAGEE INTEREST.

294. Insurable interest.
295. Loss payable clause—Construed.
296. (a) Notice of encumbrance.

SECTION.
297. (b) Knowledge.
298. (c) Vendor and vendee.
299. (d) Mortgagee can take possession.
300. "Loss, if any, payable to mortgagee, as his interest may appear".
301. (a) Other insurance.
302. (b) Carrying passengers for hire—Waiver.
303. (c) Exception—Where mortgagee is co-assured.
304. Policy form protecting interests of mortgagee.
305. Vendor and vendee.
306. Payment to mortgagee—Waiver.
307. Mortgagee is not bound by mortgagor's settlement.
308. Embezzlement rider.
309. Detachment of mortgage clause after payment of debt.
310. Change in purchase notes.
311. Statutes against encumbrances construed.
312. Pleading and practice—Parties.

CHAPTER XI.

NEGLIGENCE.

313. Fire Insurance.
314. Negligence after fire.
315. Fraudulent or wilful destruction.
316. Failing to act on application.
317. Estoppel.
318. Statute nullifies conflicting policy condition.

CHAPTER XII.

VALUED POLICIES.

319. Open or valued policies.
320. Illustrations.
321. Validity.
322. Fraud will avoid policy.
323. Construction—Misdescription of age of second-hand automobile a breach of warranty.
324. Three-fourths value. (a) Missouri statute.
325. (b) Construed.
326. Depreciation—Vexatious refusal to pay.
327. Evidence.
328. Appraisal.
329. Pleading and Practice. (a) Election.
330. (b) Admission—Total loss.

CHAPTER XIII.

CANCELLATION.

SECTION.
331. In general.
332. Notice—Cancellation not effective without.
333. Illustration.
334. Notice must be received.
335. When period begins to run.
336. Local agent.
337. Repayment of unearned premium.
338. Same—Waiver.
339. Surrender of policy.
340. Vendor in possession.
341. Termination of policy by mutual consent.
342. Oversight.
343. Mortgagee—Notice.
344. Waiver—Property outside of state.
345. Wrongful cancellation—No right of action against agent.
346. Jury—Conflict of evidence.

CHAPTER XIV.

INSURER'S LIABILITY.

347. In general.
348. Total Loss.
349. Partial loss.
350. Option to repair.
351. "Repair" or "replace"—Defined.
352. "Suitable repairs and replacements"—Defined.
353. "Actual cost to assured including equipment"—Defined.
354. Exercise of option.
355. New contractual relationship.
356. Unreasonable delay.
357. Insurer's liability reduced.
358. Rights of assignee.
359. Salvage.
360. (a) Right of action.
361. (b) Estoppel.
362. List price.
363. Lien for repairs.
364. Deductible clause.
365. Authority of adjuster.
366. (a) Agent of insurer.
367. (b) Election to repair.
368. Right of recovery—Partner.

SECTION.
369. Interest. (a) Maturity of policy.
370. (b) Sixty days after proof of loss.
371. (c) Unliquidated damages.
372. (d) Michigan statute.
373. Statute supercedes policy condition.
374. Right of action. (a) Fraud.
375. (b) Disaffirmance.
376. (c) Reservation of rights.
377. Pleading.
378. Burden of proof.
379. Special plea.
380. Waiver.
381. Evidence. (a) Expert opinion.
382. (b) Market value.
383. (c) Depreciation.
384. (d) Used car market report.
385. Instruction. (a) Car should be made whole.
386. (b) Depreciation.
387. Jury. (a) Conflict of evidence.
388. (b) Total loss.

CHAPTER XV.

NOTICE AND PROOF OF LOSS.

389. In general.
390. Notice of loss reasonable and valid.
391. "Forthwith" or "Immediate" notice.
392. Illustrations.
393. Proof of loss valid and binding.
394. Condition precedent.
395. Policy requirements.
396. Proof of mailing.
397. Mortgage clause.
398. Time.
399. Waiver and estoppel—In general.
400. (a) Denial of liability on other grounds.
401. (b) Accepting statement and admitting liability.
402. (c) Conduct.
403. (c1) Proof of loss is waived.
404. (c2) Proof of loss is not waived.
405. (d) Agents.
406. (d1) General agent.
407. (d2) Adjuster.
408. (d3) Local agent.
409. (d4) Special agent.

SECTION.
410. False statement—In general.
411. (a) General rule.
412. (b) Illustrations.
413. (c) Exception.
414. (d) Overvaluation.
415. Massachusetts statute.
416. Right of action. (a) Conduct.
417. (b) Waiver—Reservation of rights.
418. (c) Estoppel.
419. (d) Repudiation of agreement.
420. Pleading.
421. Evidence. (a) Notice lost in mails.
422. (b) Previous losses.
423. (c) Letters—Waiver.
424. (d) Agency.
425. (e) Other insurance—Cars permitted to burn.
426. (f) Erroneous answer in proof of loss.
427. Burden of proof.
428. Jury. (a) Conflict in evidence.
429. (b) Waiver.
430. Non-suit.
431. Finding.
432. Penalty and damages.
433. Appeal and error.

CHAPTER XVI.

APPRAISAL, ARBITRATION AND AWARD.

434. In general.
435. Agreement to arbitrate—Definition.
436. Appraisal and arbitration distinguished.
437. Liability.
438. Same—Statute.
439. Stipulation reasonable and valid.
440. Condition precedent.
441. Disagreement necessary.
442. Fraud.
443. Clause revocable.
444. Waiver. (a) In general.
445. (b) Illustration.
446. (c) Refusal to arbitrate.
447. (d) Offer of settlement.
448. (e) Same—After suit.
449. (f) Subsequent agreement.
450. (g) Failure to accept insurer's estimate.

SECTION.
451. Notice.
452. Right to sue.
453. Technicalities.
454. Non-waiver agreement.
455. Oral agreement.
456. Award—Validity.
457. Same—Written submission.
458. Rate book.
459. Salvage.
460. Substitution of umpire.
461. Swearing.
462. Valued policy.
463. Total loss.
464. Law or equity.
465. Pleading and practice—Measure of liability.
466. Evidence—Impeachment.
467. Instruction—Taking oath.
468. Jury—Waiver.

CHAPTER XVII.

SUBROGATION.

469. Right of subrogation.
470. Conventional subrogation.
471. Illustrations. (a) Partner.
472. (b) Garage keeper.
473. (c) Railroad.
474. Assignment.
475. Same—Statutes.
476. Negligence.
477. Settlement by and between assured and tort-feasor. (a) Insurer's right of action against assured.
478. (a1) Laches.
479. (b) Insurer's right of action against third party.
480. (b1) Other injuries.
481. (b2) Proof of negligence and right of action.
482. (b3) Antecedent settlement.
483. Right of action—In general.
484. Illustrations.
485. Separate suits for injury to person and property.
486. Release of wrongdoer by assured.
487. Same—Pleading.
488. Joint action—Where damage to insured car exceeds amount of policy.
489. Insurer's right of action against assured for misstatement in proof of loss.
490. Conditional vendor negligent.

SECTION.
491. Liability of seller for conversion.
492. Insurer's right of action against bailee.
493. Proof; conventional subrogation.
494. Stolen insured car.
495. Evidence—Stolen car.
496. Replevin to recover stolen car.
497. Right of action against subsequent purchaser.
498. Registration.
499. Waiver.
500. Measure of recovery.

CHAPTER XVIII.

PROCEDURE.

PLEADING AND PRACTICE—EVIDENCE—INSTRUCTIONS, ETC.

501. Insurer's liability.
502. Limitation of action.
503. Attorney and client. (a) Fees.
504. (b) Privileged communication.
505. (c) Right of insured's attorney to represent injured claimant.
506. Agent—Dual capacity—Void contract.
507. Assignment.
508. Same—Oral contract.
509. Parties. (a) Who sustains loss.
510. (b) Conditional sales contract.
511. (c) Assignment.
512. (d) Separate interests.
513. (e) Joint payees.
514. Complaint. (a) Ownership.
515. (b) Waiver and estoppel—Sufficiency.
516. Amendment—Limitation of action.
517. Answer. (a) Former action.
518. (b) Limited liability.
519. (c) Defense not pleaded.
520. (d) When special plea of waiver not necessary.
521. Evidence. (a) Parol.
522. (b) Incendiarism.
523. (c) Admission.
524. (d) Opinion of adjuster.
525. (e) Identity.
526. (f) Conflicting—Fraud.
527. (g) Expert.
528. (h) Same—Cause of fire.
529. (i) Value.

SECTION.
530. (j) Same—Fraud.
531. (k) Undelivered bill of sale.
532. (l) Additional insurance.
533. (m) Sufficiency.
534. (n) Policy issued subject to another.
535. (o) Process of elimination.
536. (p) Cancellation.
537. (q) Directed verdict.
538. Burden of proof.
539. Instructions. (a) Duress.
540. (b) Deliberate act.
541. (c) Measure of recovery.
542. (d) What constitutues new car.
543. (e) Waiver of defenses.
544. Jury. (a) Prejudice.
545. (b) Modification of policy.
546. (c) Vexatious refusal to pay loss.
547. (d) Conflict in findings.
548. Appeal and error. (a) Verdict of jury.
549. (b) Hearsay evidence.
550. Judgment. (a) Time of payment.
551. (b) Right of action—When accures.

CHAPTER XIX.

REFORMATION.

552. In general.
553. Illustrations—Owner of equitable interest designated as assured.
554. Failure of agent to deliver full coverage policy.
555. Soliciting agent.
556. Policy written by agent who examined car.
557. Fraud of agent.
558. Transfer of car—Failure of agent to change policy.
559. By-laws.
560. Reformation denied—In general.
561. Illustrations—Laches will prevent.
562. Same—Failure of assured to inform broker as to his interest in insured car.
563. Procedure. (a) Erroneous description.
564. (b) Recovery cannot be had without reformation.
565. (c) Pleading.
566. (d) Mistake in engine number.
567. (e) Proof—Conflict of testimony.

PART TWO

MATTERS PERTAINING TO SPECIAL FORMS OF AUTOMOBILE INSURANCE.

CHAPTER XX.

FIRE INSURANCE.

SECTION.
568. In general.
569. Fire risks not covered.
570. Fire extinguisher.
571. Dealer's fire policies. (a) Reporting risks "as known."
572. (b) Covered until delivered to purchaser.
573. Criminal misconduct.
574. Arson.
575. Conversion by insurer.
576. Valued policy—Depreciation.
577. Evidence—Authority of agent.
578. Pleading—Value—Proof—Notice.
579. Burden of proof.
580. Measure of damages.
581. Jury—Evidence.
582. Appeal and error.
583. Lessor and lessee.

CHAPTER XXI.

THEFT INSURANCE.

584. In general.
585. Interpretation.
586. Definition.
587. Intent.
588. Illustrations. (a) Wife.
589. (b) Seller's instructor.
590. (c) Gardener.
591. (d) Unknown.
592. (e) One who claims ownership.
593. (f) Garage employee.
594. (g) Chauffeur.
595. (h) "Joy rider".
596. (i) Abandonment.

SECTION.
597. Fraudulent trick, scheme or device consituting theft. (a) In general.
598. (b) Common law.
599. (c) Statute.
600. (d) Prevailing rule.
601. (e) Illustrations. (e1) Worthless check.
602. (e2) Borrowing.
603. (e3) Renting.
604. (e4) Bailee.
605. (e5) Conditional sales.
606. Evidence of theft. (a) In general.
607. (b) Illustrations. ((b1) Presumption.
608. (b2) Prima facie proof.
609. (b3) Unsupported evidence of assured.
610. (b4) Conversion.
611. (b5) Borrower.
612. (b6) "Joy rider".
613. (b7) Employee.
614. (b8) Removal of spare tire.
615. (b9) Disappearance from garage.
616. (b10) Repair shop.
617. (b11) Boat.
618. (b12) Conditional vendee.
619. (c) Jury. (c1) In general.
620. (c2) Illustrations—Abandonment.
621. (c3) Joy rider.
622. (c4) Employee.
623. (c5) Bailee.
624. (c6) Record owner.
625. Measure of recovery. (a) In general.
626. (b) Converson.
627. (c) Diminution of value.
628. (d) Construction—Rider.
629. (e) Depreciating rate schedule.
630. (f) Collision.
631. (g) Loss of rectifier.
632. (h) Tools.
633. (i) Conditional purchaser.
634. (j) Possession.
635. (k) Partial loss.
636. (l) Evidence.
637. (m) Burden of proof.
638. (n) Instruction.
639. (o) Jury.
640. (p) Interest—Time of computation of.
641. (q) Penalty and attorney fees.
642. (r) Appeal and error—Illustrations.
643. Recovery of automobile. (a) In general.
644. (b) Return of insured car—Reasonable time.

SECTION.
645. (c) Abandonment.
646. (d) Duty of insurer.
647. (e) Cooperation.
648. (f) Release—Consideration.
649. (g) Agent's representation.
650. (h) Solicitor fees and costs.
651. (i) Measure of damages.
652. (j) Value.
653. Locking device. (a) In general.
654. (b) General rule.
655. (c) Illustrations.
656. (d) Exception—Where premium is not reduced.
657. (e) Supended.
658. (f) Due diligence.
659. (g) Jury.
660. (h) Construction.
661. (i) Descriptive.
662. (j) Defense.
663. (k) Subrogation.
664. (l) Waiver. (1) Condition subsequent.
665. (2) Adjuster.
666. (3) Retaining premium—Knowledge of breach.
667. (4) Payment of mortgage under "loss payable" clause.
668. (m) Pleading—Burden of proof.
669. (n) Evidence—Harmless error.
670. (o) Finding—Vexatious delay.
671. Carrying passengers for hire. (a) Application.
672. (b) Duty of insured.
673. (c) Knowledge.
674. (d) Diligence alone not sufficient.
675. (e) Suspended.
676. (f) Rented.
677. (g) Evidence.
678. Insuring against theft except by a person or persons in assured's household. (a) In general.
679. (b) Illustrations. (b1) Nephew.
680. (b2) Caretaker.
681. (b3) Employee.
682. (b4) Volunteer.
683. (b5) Gardener.
684. (b6) Bailment.
685. (c) Evidence.
686. (d) Defense.
687. (e) Burden of proof.
688. (f) Jury—Illustrations.
689. Automobile dealer's open policy. (a) Covering until car "Delivered to the purchaser," etc.

SECTION.
690. (b) Burden of proof.
691. (c) Evidence.
692. (d) Measure of recovery.
693. Procedure. (a) In general.
694. (b) Parties.
695. (c) Pleading—Title and ownership.
696. (d) Evidence. (d1) Immateriality.
697. (d2) Fraud—Parol evidence.
698. (d3) Proof.
699. (e) Matters of defense. (e1) Policy condition.
700. (e2) Gross negligence.
701. (e3) Exchange of cars.
702. (f) Burden of proof.
703. (g) Jury—Fraud.

CHAPTER XXII.

COLLISION INSURANCE.

704. In general.
705. Use and coverage.
706. Definition.
707. Maritime insurance.
708. Rule of ejusdem generis—Exception.
709. Collision—What it imports.
710. Impact with the ground.
711. Water and land.
712. Approximate cause.
713. Illustrations. (a) Breaking an axle.
714. (b) Striking a stump.
715. (c) Striking a tree.
716. Roadbed.
717. Same—Exclusion clause.
718. Contact with embankment, ditch or ledge.
719. (a) Embankment.
720. (b) Ditch.
721. (c) Ledge.
722. Rut.
723. Washout.
724. Shoulder of pavement.
725. Curbing.
726. Upsets.
727. (a) Quick application of brakes.
728. (b) Car settling in soft ground.
729. (c) Short turn while driving rapidly.
730. Contact with bridge.
731. Skidding.

SECTION.
732. Fall of scoop upon truck.
733. Falling down elevator shaft.
734. Collapse of building.
735. Driving in violation of law.
736. Age of driver.
737. Bumpers—Promissory warranty.
738. Negligence of third party.
739. Measure of damages. (a) Contract of indemnity.
740. (b) "Actual cost of repairing or replacing parts damaged or destroyed" construed.
741. (c) Conditional vendor.
742. (d) Value of property.
743. Evidence. (a) Accidental.
744. (b) Expert testimony.
745. (c) Amount of damages—Jury.
746. (d) Total loss.
747. (e) Dismissal.
748. (f) "Suitable repair and replace."
749. Burden of proof.
750. Erroneous instruction.
751. Loss sustained—Payment of judgment.

CHAPTER XXIII.

CONVERSION OF EMBEZZLEMENT INSURANCE.

752. In general.
753. Valid.
754. Conditional purchaser.
755. Policy insuring vendor and vendee, as their interests may appear.
756. Joinder.
757. Riders.—Ambiguity.
758. Notice.—Default in payment.
759. Proof of loss.—Waiver.—Denial on other grounds.
760. Registration.—Waiver.

CHAPTER XXIV.

TRANSPORTATION INSURANCE.

761. In general.
762. Illustrations—Ferry boat.
763. Elevator.
764. Derailment.
765. Transit policy.
766. Exclusion clauses—Transportation of goods or merchandise.

CHAPTER XXV.

LIABILITY INSURANCE.

A. PUBLIC POLICY.

SECTION.
767. In general.
768. Legislation.
769. Statutory regulations. (a) Operating car without license.
770. (b) Operating car by one under statutory age.
771. (c) Policy conditions—Validity.
772. Liability for criminal negligence.
773. Same—Where neglicent conduct constituted criminal offense—Distinguished.
774. Indemnity bond insuring against violation of city ordinance.
775. Negligence.
776. Insurer conducting defense.

B. INDEMNITY AND LIABILITY INSURANCE.

777. In general.
778. Indemnity and liability insurance distinguished.
779. Liability policy—Rule of construction.
780. Illustrations.
781. Insurer's Liability subject to conditions of policy.
782. Injured claimant's right of action.
783. Garnishment.
784. Estoppel.
785. "No action" clause—Indemnity policy. (a) In general.
786. (b) General rule.
787. (c) Rule applied.
788. (d) Absence of "No action" clause.
789. (e) Garnishment.
790. (f) Bankruptcy or insolvency.
791. (g) In equity—Receivership.
792. (h) Paying judgment with promissory note, etc.
793. (h1) Miscellaneous—Execution sale.
794. (h2) Borrowed money.
795. (i) Minority view.

C. RIGHT OF INJURED CLAIMENT TO RECOVER FROM INSURER.

796. In general.
797. Terms of policy.
798. Privity of contract.
799. Policy creating separate right of action.
800. Insurer's liability—Policy inuring to benefit of injured claimants.

SECTION.
801. (a) Car operated with consent of owner—Evidence.
802. (b) Joint tort-feasor.
803. (c) Public conveyance for carrying passengers.
804. Liability imposed by law.
805. Judgment—To what extent conclusive.
806. Same—When obtained without knowledge of insurer.
807. Statutes.
808. Same—Insolvency.
809. Procedure—Pleading and practice. (a) Right of action—Partnership.
810. (b) Judgment on writ of inquiry—Notice.
811. (c) Parties.
812. (d) Same—Constitutionality.
813. (e) Joint defendants—Burden of proof.
814. (f) Time of action.
815. (g) Defense.
816. (h) Same—Right to repudiate liability.
817. (i) Execution unsatisfied.
818. (j) Same—Joinder.
819. (k) Costs.

D. NOTICE OF ACCIDENT OR CLAIM.

820. In general.
821. Condition precedent.
822. Rule of reasonable construction.
823. Due diligence.
824. Newspaper notice.
825. Notice to broker.
826. Notice not necessary where insurer party to suit.
827. Miscellaneous illustrations.
828. Notice as affecting rights of injured claimant.
829. Same—Pleading.
830. "Loss"—Construed.
831. Statute.
832. Waiver. (a) In general.
833. (b) Waiver clause construed.
834. (c) Option to defend or deny liability for failure to give notice.
835. (d) Pleading.
836. (e) Proof of notice.
837. (f) Burden of proof.

E. AGREEMENT TO DEFEND.

838. In general.
839. Criminal suits not included.
840. Refusal to defend.
841. Election to defend.
842. Assured may make settlement.

SECTION.
843. Settlement without judgment.
844. Waiver.
845. Reserving question of liability.
846. Laches.
847. Knowledge.
848. Malpractice as defense.
849. Insurer's liability for failure to defend.
850. Liability fixed by amount of policy.
851. Liability for failure to perfect appeal.
852. Same—Burden of proof—Evidence.
853. Burden of proof—Optional contract.
854. Right to abandon—Estoppel by conduct.
855. Insurer liable for court costs.
856. Expenses for investigation.
857. Bond and poundage fees as costs.
858. Attorney fees.
859. Exception.
860. Private counsel.
861. "No action clause."

F. COOPERATION OF ASSURED.

862. In general.
863. Assured's obligation to cooperate.
864. What cooperation means.
865. What constitutes failure to cooperate.
866. Prosecution of assured's action.
867. Refusal of assured to defend on ground of contributory negligence.
868. Discrepancy in statement.
869. Same—Mistake.
870. Error.
871. Assured insolvent.
872. Waiver.
873. Jury.

G. SETTLEMENT.

874. In general.
875. Insurer under no obligation to settle.
876. Liability limited to face amount of policy.
877. Right of assured to protect himself against excess liability.
878. Settlement by assured without consent of insurer.
879. When insurer refuses to defend.
880. (a) Evidence.
881. (b) Waiver.
882. (c) Clause for payment after trial and judgment construed.
883. (c1) Settlement on recommendation of insurer's attorney.

SECTION.
884. Settlement after judgment.
885. Duress.
886. No provision that insurer shall defend.
887. Releases insurer from liability.
888. Clause prohibiting assured from interfering with settlement of suits construed.
889. "To interfere in negotiations for compromise"—Construed.
890. Insurer not liable where assured voluntarily pays judgment against daughter.
891. Execution creditor.
892. Evidence—In action where judgment exceeded amount of insurance.

H. INSURER'S LIABILITY—IN GENERAL.

893. Contract of insurance.
894. Accident—Definition.
895. Negligence.
896. Use at time of accident.
897. Claims on account of bodily injuries.
898. What constitutes "one accident."
899. Valued policy.
900. Appreciation in value.
901. Interest.
902. Policy issued to partnership.
903. Accident "caused by automobile"—Construed.
904. Measure of recovery.
905. Duress.
906. "Use in public service"—Construed.
907. "Use and operation of vehicles in insured's business"—Applied.
908. Injuries sustaned by president—Construed.
909. Change of motor.
910. "One driver" clause.
911. "Use by himself"—Construed.
912. When insurer not liable for acts of assured's chauffeur.
913. "Loss and expense by reason of claims made upon assured"—Construed.
914. Liability policy for public benefit—Jitney policy.
915. Where insurer obligates itself to greater extent than required by statute—No defense.
916. Liability of insurer for negligence of dependent members of insured's family.
917. Change of interest.
918. Same—City ordinance.
919. Test of business uses.
920. Assured's loss as member of partnership.
921. Violation of speed law.
922. Assured signing minor's application for license.

SECTION.
923. Same—"Other's liability assumed under contract"—Construed.
924. Assured's right of recovery for wife's injuries.
925. Deductible clause.
926. Omnibus coverage clause. (a) In general.
927. (b) Assured—Defined.
928. (c) Additional assured—Defined.
929. (d) Permission to use—Construed.
930. (e) Not words of limitation.
931. (f) Not an accident policy.
932. Age limit. (a) In general.
933. (b) Valid.
934. (c) Illustrations.
935. (d) Statute.
936. (e) Estoppel.
937. (f) Evidence.
938. (g) Burden of proof.

I. PROCEDURE.

939. When action accures.
940. Venue.
941. Res adjudicata.
942. Same.
943. Attorney fees.
944. Vexatious refusal to pay.
945. Illustration.
946. Failure to appeal—Measure of damages.
947. Pleading. (a) Presumption as to expiration of policy.
948. (b) Sufficiency as to averment of non-payment.
949. (c) Answer—Sufficiency—Appeal bond.
950. (d) Defense—Negligence.
951. (e) Same—Wrongful interference with contractual rights.
952. Evidence. (a) Existence of insurance.
953. (b) Cross-examination.
954. (c) Person driving car.
955. (d) Fraudulent release.
956. (e) Authority of adjuster.
957. (f) Negligence—Chauffeur.
958. Jury—Right to trial by.
959. Judgment. (a) Excessive.
960. (b) Collateral attack.
961. (c) Insolvent judgment creditor.
962. (d) Interest.
963. (e) Costs—Deductible clause.

CHAPTER XXVI.

MUTUAL ASSOCIATIONS AND RECIPROCALS.

A. MUTUAL ASSOCIATIONS.

SECTION.
964. In general.
965. Rules of association—Transfer.
966. Approval of policy forms by superintendent of insurance.
967. Assessments and liquidation.
968. Statute—Attorney fees.
969. Waiver—Defense of action—By-laws.

B. RECIPROCAL OR INTERINSURANCE EXCHANGE.

970. In general.
971. Contract one of insurance.
972. Limitation of authority.
973. "Reciprocal" and "Mutual" distinguished.
974. Estoppel.
975. Receiver.
976. (a) Parties.
977. (b) Creditors' bill proper remedy.
978. Negotiations for settlement—Failure to deny liability—Waiver.
979. Right of action.

PART ONE

MATTERS COMMON TO ALL FORMS OF AUTOMOBILE INSURANCE

AUTOMOBILE INSURANCE

CHAPTER I.

STATE REGULATION.

SECTION.

1. In general.
2. Insurance corporations creatures of law.
3. Individuals may conduct insurance business.
4. Power of state.
5. Admission of foreign companies.
6. Automobile insurance.
7. Compulsory motor vehicle insurance acts.
8. (a) Massachusetts.
9. (b) New Hampshire.
10. (c) Connecticut.
11. Motor vehicle acts—Iowa, New York, California.
12. Statutory enactments.
13. Standard form policy.
14. Taxation.
15. Reserve.

§ 1. In general.

Regulation and supervision of insurance companies and the business of insurance does not come within the scope of the constitution of the United States and is not subject to the authority of the federal government. It is a matter of private and corporate contract, and not interstate commerce. In a leading early case (1866),[1] the supreme court of the United States, in the words of Mr. Justice Field, said: "Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any sense of the word. They are not subjects of trade and barter, offered in the market as something having an existence and

1. Paul v. Virginia, 8 Wall. 168, 19 L. Ed. 357.

value independent of the parties to them. They are not commodities to be shipped or forwarded from one state to another and there put up for sale. They are like other personal contracts between parties which are completed by their signatures and the transfer of the consideration." It was held that the statute was not in conflict with that clause of the constitution of the United States which declares that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states," nor with the clause which declares that Congress shall have power "to regulate commerce with foreign nations and among the several states."[2]

§ 2. Insurance corporations creatures of law.

Insurance corporations are creatures of the law, and are subject to legislative control and regulation, and, in enacting laws providing conditions for doing business within the state, they do not possess the privileges and immunities secured to a citizen.[3] They are precisely what the incorporate act has made them, and can only be exerted in the manner which that act authorizes. In other words, the state prescribes the purposes of the corporation and the means of executing those purposes. The purposes and means are within the state's control. This is true as to domestic corporations, and has even a broader application to foreign corporations.[4]

§ 3. Individuals may conduct insurance business.

The insurance business is not necessarily a corporate enterprise, even though to all intents and purposes, it is practically; for any person may engage in the insurance

2. Paul v. Virginia, 8 Wall. 168, 19 L. Ed. 357.

3. Paul v. Virginia, 8 Wall. 168, 19 L. Ed. 357; LaFayette Ins. Co. v. French, 18 How. 404, 15 L. Ed. 451; Blake v. McClung, 172 U. S. 239, 19 Sup. Ct. 165, 43 L. Ed. 432; Orient Ins. Co. v. Daggs, 172 U. S. 557, 19 Sup. Ct. 281, 43 L. Ed. 552.

4. Fidelity Mutual Life Ass'n of Phila. v. Mettler, 185 U. S. 308, 22 Sup. Ct. 662, 46 L. Ed. 922; Hooper v. California, 155 U. S. 648, 15 Sup. Ct. 207, 39 L. Ed. 297; Waters-Pierce Oil Co. v. Texas, 177 U. S. 29, 20 Sup. Ct. 518, 44 L. Ed. 27.

business, unless forbidden by law.[5] But the states may, in their discretion, by legislative enactment, restrict the right to carry on the insurance business to corporations and deny it to individuals, partnerships, or unincorporated associations.[6] In the absence of a statute requiring incorporation, citizens of the state acting as individuals, partnerships, or voluntary associations may conduct the business of insurance in the state, without being incorporated.[7] A like privilege inures under the constitution of the United States to citizens of other states. General statutory provisions regulating the insurance business are ordinarily applicable to corporations, associations, partnerships, or individuals engaging in any kind of insurance business.[8]

§ 4. Power of state.

The business of insurance is quasi public in character, and the right to engage in it is a franchise, at least so far as corporations are concerned, and accordingly, it is competent for the state, either under its police power or as creator or comptroller of corporations, to determine who may engage in the business within its boundaries, and to prescribe terms and conditions on which the business may be conducted, and generally to regulate the business and all persons engaged in it, whether as individuals, partner-

5. Henning v. U. S. Ins. Co., 47 Mo. 425, 432 4 Am. R. 332 (quoted Northrup v. Mississippi Valley Ins. Co., 47 Mo. 435, 439, 4 Am. R. 337).

6. Peo. v. Loew, 19 Misc. 248, 44 N. Y. S. 42, 26 N. Y. Civ. Proc. 132; Weed v. Cumming, 198 Pa. 442, 48 A. 409; Commonwealth of Pennsylvania v. Vrooman, 164 Pa. 306, 30 A. 217, 44 Am. S. R. 603, 25 L. R. A. 250; Arrott v. Walker, 118 Pa. 249, 12 A. 280; In re Unincorporated Ins. Business, 32 Pa. Co., 35; In re Lloyd's Ass'n, 15 Pa. Co., 586.

7. Hoadley v. Purifoy, 107 Ala. 276, 18 S. 220, 30 L. R. A. 351; Northrup v. Mississippi Valley Ins. Co., 47 Mo. 435, 4 Am. R. 337; Henning v. U. S. Ins. Co., 47 Mo. 425, 4 Am. R. 332; Solomon v. New Jersey Indem. Co., 94 N. J. L. 318, 110 A. 813; In re Life Ins., 15 Pa. Dist. 126.

8. Mutual L. Ins. Co. v. Boyle, 82 Fed. 705; Metropolitan L. Ins. Co. v. McNall, 81 Fed. 888; People v. Payn, 26 App. Div. 584, 50 N. Y. S. 334; Hopkins v. Connecticut Gen. L. Ins. Co., 158 N. Y. S. 79 (rev. 160 N. Y. S. 247).

ships, voluntary associations, or corporations.[9] The insurance business is charged with a public interest, and as such is subject to the police power of the state and subject to state control and supervision.

§ 5. Admission of foreign companies.

A state has the right to impose conditions, not in conflict with the constitution or the laws of the United States, to the transaction of business within its territory by an insurance company organized under the laws of another state, or to exclude such company from its territory, or, if such company has been given a license, to revoke it, with or without cause.[10] The principle that the right of a foreign corporation to engage in business within a state other than that of its creation, depends solely upon the will of such other state, has been long settled, and many phases of its application have been illustrated by the decisions of the supreme court of the United States.[11]

§ 6. Automobile insurance.

As it is well settled that the business of insurance is of such a peculiar character, affects so many people and is so intimately connected with the common good that the states have power to regulate and control all insurance companies doing business within their borders, such regulation and supervision would seem peculiarly applicable to

9. National Union Fire Ins. Co. v. Wanberg, 43 S. Ct. 32; German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 34 S. Ct. 612, 58 L. Ed. 1011, L. R. A. 1915, C. 1189 (aff. 189 Fed. 769); German Alliance Ins. Co. v. Hale, 2119 U. S. 307, 31 S. Ct. 246, 55 L. Ed. 229.

10. Doyle v. Continental Ins. Co., 94 U. S. 535; Ins. Co. v. Morse, 20 Wall. 445; Barron v. Burnside, 121 U. S. 186; Hooper v. California, 155 U. S. 652; People v. Seddon Underwriting Company and Seddon, 27 N. Y. Crim. Rep. 146, 140 N. Y. S. 466; People ex rel. Hartford Life & Annuity Ins. Co. v. Fairman (N. Y.), 12 Abb. New Cases, 252.

11. Hooper v. California, 155 U. S. 652; Home Ins. Co. v. New York, 134 U. S. 594; Ashley v. Ryan, 153 U. S. 436, 445; State v. Stone, 118 Mo. 388; New York Life Ins. Co. v. Cravens, 178 U. S. 491; Nutting v. Mass, 183 U. S. 556; Daggs v. Ins. Co., 136 Mo. 382, 172 U. S. 557.

the business of automobile insurance.[12] The automobile is now used almost universally. The public need for automobile insurance is shown by the fact that during the year 1928, according to figures released by the national safety council, there were 800,000 automobile accidents in the United States; 27,000 people were killed, and property loss amounted to $850,000,000. The business has grown to gigantic proportions almost over night, and the public need for universal automobile insurance is everywhere apparent. Compulsory automobile insurance may be of doubtful expediency, but the necessity for governmental supervision to the end of protecting the public interests from financial loss by reason of the negligent or criminal misconduct of irresponsible operators is no longer a debatable question. Standard policy forms are a recognized national necessity.

§ 7. Compulsory motor vehicle insurance acts.

Legislature has power to enact compulsory motor vehicle insurance act which provides: (a) that judgment creditor's claim may not be defeated by any statement made by insured or on his behalf, or any act of insured in violation of the terms of the policy; (b) that principal of policy or bond can not be cancelled before expiration of such policy or bond except under certain named conditions; (c) for suspension of license to do business as penalty for insurance or bonding company's refusal to comply with decisions of board of appeal provided for by the legislature; and (d), that liability policy or bond shall cover all claims arising from personal injuries caused by motor vehicle.[13]

An opinion of the Justices of the state of Massachusetts was prepared in response to certain questions propounded with respect to the draft of the statute entitled: "An act requiring owners of certain motor vehicles and trailers to furnish security for their civil liability on account of per-

12. Merchants' Mutual Auto Liability Ins. Co. v. Smart, 267 U. S. 126, 129, 45 S. Ct. 320, 69 L. Ed. 538, 541, 542.

13. In re Opinion of the Justices, Mass. S. C. J., 251 Mass. 569, 147 N. E. 681.

sonal injuries caused by their motor vehicles and trailers." The draft of the statute was an appendix to a report of a joint legislative committee of the state of Massachusetts appointed in 1924 to study various problems relating to motor vehicles and their use on the highways * * *. It was stated in that report that in the commonwealth of Massachusetts the motor vehicle "caused death or injury to more than 20,000 persons in a single year" and that "550 fatal accidents, causing 578 deaths," occurred in the year 1923 from that cause alone. The report referred to an analysis showing that blame for substantially two-thirds of those casualties rested on the operator of the motor vehicle. It also stated that owners of about 30 percent of the registered automobiles protected themselves by insurance and that there were no means of ascertaining how many of the owners of the other 70 percent were financially responsible, but that large numbers of persons injured and representatives of those killed were unable to obtain financial redress.

Commenting on the necessity for compulsory automobile insurance legislation, the Justices said: "Manifestly the evil which the proposed statute is designed to diminish and in part remedy is appalling in its toll of life and suffering. It is common knowledge that the movement of the motor vehicle is or may easily become a danger to all others upon highways. It is not necessary to indulge in presumptions as to the existence of reasons for the enactment of the proposed statute. The report of the joint special committee discloses facts justifying the adoption of any rational means calculated to diminish the loss arising from injuries on public ways caused by motor vehicles." [14]

It was said that it is within the legislative power to extend liability of motor vehicle owner to include liability for personal injuries caused by vehicle while being negligently

14. In re Opinion of the Justices, 251 Mass. 569, 147 N. E. 693 (1925).

operated by owner's express or implied consent, though not by himself, his servant or agent.[15]

"The power * * * to regulate travel over the public ways of the commonwealth for the general welfare is extensive. It may be exercised in any reasonable manner to conserve the safety of travelers. No one has a right to use streets and other public places as he chooses without regard to the presence of others. It is an underlying conception of streets and highways that they shall at all times be reasonably safe and convenient for public travel and that travelers thereon in the exercise of due care may be secured from preventable danger * * *."[16]

"The legislature has large powers in the regulation of the business of insurance. That business is of a peculiar nature. It affects large numbers of people and is intimately connected with the general welfare. The form of fire insurance policies has been prescribed by statute * * * for many years. Regulation of business of insurance may be supported both as an exercise of the police power for the common good and on the ground that corporations, foreign and domestic, being creatures of legislative power, are subject to reasonable control as condition of transacting business * * *."[17]

"The main object of the bill is to protect careful travelers on the highway injured by negligence in the operation of motor vehicles and to afford them some redress for such injuries. The legislative question involved in this aspect is this: when a financially irresponsible owner or operator of a motor vehicle, insured by a policy or bond procured by some material misrepresentation, negligently injures another traveler on the highway in the exercise of due care, which of two innocent persons must suffer, the injured traveler, or the insurer or surety? The legislature may believe that the opportunities open to the insurer or surety for inquiry and

15. In re Opinion of the Justices, 251 Mass. 569, 147 N. E. 693 (1925).
16. In re Opinion of the Justices, 251 Mass. 569, 147 N. E. 693 (1925).
17. In re Opinion of the Justices, 251 Mass. 569, 147 N. E. 699 (1925).

investigation before issuing the policy or signing the bond are such as to afford it substantial protection against harm.[18]

"The proposed extension of liability and the requirement for security by the owner of a motor vehicle for compensation of personal injuries caused by it do not differ in principle from the civil liability act affording remedy to those injured by an intoxicated person against the person who caused such intoxication in whole or in part by sale or gift of intoxicating liquor * * *.[19]

"The general principle which sustains this aspect of the proposed bill is that, when the general welfare of travelers on the highway in the opinion of the legislature is threatened by and demands protection against a specific evil, any rational means may be adopted to remedy the evil."[20]

In New Hampshire, request was made by the senate for the opinion of the supreme court as to the validity of a proposed bill for compulsory insurance against liability for injury inflicted in the operation of automobiles. The act provided as a prerequisite to the registration of motor vehicles, for the establishment of financial responsibility by owners for injury, including death resulting therefrom, to persons or damage to property caused by the negligent use, maintenance or operation of motor vehicles. The Justices summed up their opinion with these words: "The basic idea of requiring security from those who operate motor vehicles upon the highways is one that may be put in force. Any law seeking this end must answer the constitutional requirement of reasonableness and equality. This result can be attained by requiring substantially like security from all who engage in such an undertaking. A requirement of corporate rather than individual security is valid; but, if individual security is permitted, it is doubtful if the discrimination in that respect, found in the proposed

18. In re Opinion of the Justices, 251 Mass. 569, 147 N. E. 699 (1925).
19. In re Opinion of the Justices, 251 Mass. 569, 147 N. E. 695 (1925).
20. In re Opinion of the Justices, 251 Mass. 569, 147 N. E. 681 (1925).

law, could be sustained. Any classification of persons which the law makes must be based upon substantial reason. Such reason does not exist as to an inclusion of annual permits and the exclusion of those issued for a shorter period, or for a limited area. It is doubtful if a law could be sustained if it required security from all those required to secure permits, and exempted those allowed to operate without a permit." [21]

§ 8. Compulsory motor vehicle insurance acts. (a) Massachusetts.

The legislature of the state of Massachusetts, at its 1925 session, passed an act entitled "An act requiring owners of certain motor vehicles and trailers to furnish security for their civil liability on account of personal injuries caused by their motor vehicles and trailers." [22] The statute has since been amended.[23] It provides that applications for registration of motor vehicles shall be accompanied by a certificate of motor vehicle liability. This certificate may be based upon a motor vehicle liability bond, a motor vehicle liability policy or a deposit of cash or securities with the state. All certificates must be on a form approved by the commissioner of insurance. No motor vehicle shall be operated unless it is covered by such a certificate. The insurance policy or bond shall be to the amount or limit of at least $5,000 on account of injury to or death of any one person, and subject to such limits as respects injury to or death of one person, of at least $10,000 on account of any one accident injuring more than one person. If judgment against the principal on the policy or bond is not satisfied within 30 days after its rendition, the judgment creditor has a right of action in the name of the commonwealth against the insurer or surety. The liability policy is subject to cancellation on 15 days' notice by either party.

21. Re Opinion of the Justices, 81 N. H. 566, 129 Atl. 117, 39 A. L. R. 1028 (1925).

22. Acts 1925, chap. 346.

23. Mass. Laws 1926, chap. 368; Laws 1928, chap. 381.

§ 9. Compulsory motor vehicle insurance acts. (b) New Hampshire.

An act of the legislature of the state of New Hampshire relating to motor vehicle insurance provides that the plaintiff in an action to recover for property damage or personal injuries in a motor vehicle accident case may petition the court to make a preliminary inquiry into three questions: 1st, as to negligence of defendant. 2nd, was motor vehicle operated by owner? 3rd, if not operated by owner was it operated with his consent? In case the court finds negligence on the part of the defendant, he shall order the defendant to furnish security forthwith not in excess of $5,000 for bodily injuries or death or $1,000 for damage to property to satisfy, within 30 days after rendition of judgment, the amount for which the defendant may be found liable, but not exceeding the security furnished, for the respective forms of liability. If defendant fails to furnish security the court shall enter an order prohibiting him from operating motor vehicles in the state and prohibiting the operation in the state of any motor vehicles owned by said defendant. A liability policy or surety bond may be satisfactory security. The liability of any insurer is made absolute, and payment of the judgment by assured is not a condition precedent to insurer's liability. Insurer is directly liable to the injured claimant.[24]

§ 10. Compulsory motor vehicle insurance acts. (c) Connecticut.

The legislature of Connecticut at its 1927 session passed an act entitled "An act concerning financial responsibility for damages caused by the operation of motor vehicles."[25] It provides that the commissioner of motor vehicles may require from persons who have violated the automobile laws in certain ways, a proof of their financial responsibility. This proof shall be satisfactory to the commissioner and may consist of an insurance policy, a surety company

24. New Hampshire Laws 1927, chap. 54.
25. Connecticut, Public Acts 1927, p. 4242.

bond, a bond with individual surety or a deposit of cash with the state treasurer. Such bond, money or collateral shall be held by the commissioner as security for the payment of any judgment to a claimant who has suffered damages by the operation of the principal's car, with his consent.

§ 11. Motor vehicle acts. Iowa, New York, California.

The legislature of the state of Iowa has passed an act effective July 4, 1929, which amends the motor vehicle act of that state, and makes it incumbent upon every automobile owner to carry casualty insurance for self-protection. The law provides that when a final judgment is recovered in any court of record, in a suit for damages for injury or death, of a person or for injury to property caused by the operation or ownership of any motor vehicle on the highways of the state, and such judgment remains unstayed and unpaid for a period of sixty days, upon the filing of a transcript of judgment with the county treasurer, the county treasurer shall forthwith suspend the registration of any and every motor vehicle registered in the name of such judgment debtor or debtors and the county treasurer shall immediately notify such owner or owners by registered mail of such cancellation, and the owner so notified shall within ten days of the mailing of such notice deliver to the county treasurer all plates or licenses so suspended and such suspension shall not be removed nor the license plates returned by the county treasurer, nor shall a license to operate a motor vehicle thereafter be issued to such judgment debtor or debtors, nor shall a motor vehicle be registered in the name of such judgment debtor or debtors until proof that judgment has been stayed, satisfied or otherwise discharged of record, has been filed with the county treasurer.[26]

Other states, such as New York and California,[27] rejecting

26. Iowa Code 1927, chap. 251, as amended.

27. Chaps. 258, 259. California Statutes 1929, effective August 14, 1929.

the Massachusetts idea of compulsory automobile insurance, have enacted quite similar legislation, for the prevention of automobile accidents and to provide greater assurance that automobile accident judgments will be paid.

§ 12. Statutory enactments.

Any state may lawfully require insurance companies to obtain a license before doing business within its boundary,[28] and such a statute is universal. Recent open policy plan of certain insurers was evolved by which the premiums were collected from dealers who in turn collected them from purchasers, but it has been held that such a plan of insuring violates the statutory enactment providing that insurance of property can only be written through agents authorized to do business in the state.[29] And it has been held by the federal court that the due process clause of the constitution is not violated by Maine statute requiring agents to be licensed, when applied to retail dealers selling automobiles and insurance under open policy issued in Michigan, neither is such statute void as attempting to regulate interstate commerce.[30]

§ 13. Standard form policy.

Standard form policy statutes for automobile fire insurance business have not been adopted, as is the case in the fire insurance business, but the companies and underwriters have made appreciable progress by mutual agreement in standardizing the use of many of the more important forms of coverage. However, there is much to be accomplished, and there is today a crying need in this country for state

28. Atty. Gen. v. North American Life Ins. Co., 82 N. Y. 172.

29. Palmetto Fire Ins. Co. v. Conn., 272 U. S. 295, 47 Sup. Ct. 88, aff'g 9 Fed. (2d) 202.

30. Chrysler Sales Corp. v. Spencer Ins. Comm'r, 9 Fed. (2nd) 674 (1925); Utterback-Gleason Co. v. Spencer, 9 Fed. (2nd) 674 (1925); Chrysler Sales Corp. v. Smith (D. C.), 9 Fed. (2nd) 666 (1925); Palmetto Fire Ins. Co. v. Beha (D. C.), 13 Fed. (2nd) 500 (1925); State v. Spaulding, 166 Minn. 167, 207 N. W. 317 (1926).

legislation standardizing, by statutory enactment, the use of leading automobile insurance forms of coverage. As matters now stand, the interests of both the company and the insured are neglected and unprotected because of the failure of the states to enact needed legislation.

The advantages which we suggest that will obtain by the enactment of standard forms of automobile insurance coverage are these:

1. Uniformity in the policy provisions;
2. Certainty as to the legal rights under the policy of both the insurer and the insured by reason of judicial interpretations and judicial decisions;
3. Protection of the insured against unreasonable and unjust provisions in the policy;
4. Adjustments more satisfactorily and expeditiously made;
5. Litigation reduced to a minimum;
6. Insured has reasonable certainty of recovery;
7. Automobile insurance business placed upon recognized basis of stability and permanency;
8. Insurers are protected against alleged waivers by agents;
9. Insurers are protected by provisions of the policy for its avoidance and suspension;
10. Opportunity for fraud is limited;
11. Warranties hold the insured to strict liability;
12. Reckless competition of new companies proposing unusual forms of protection avoided.

§ 14. Taxation.

Under a system of taxing net assets of insurance companies, the inclusion in a company's gross assets of its nontaxable securities constitutes taxation of such securities.[31]

31. State ex rel. American Automobile Ins. Co. v. Schramm, 271 Mo. 223, 196 S. W. 21 (1917).

§ 15. Reserve.

A company organized to write all kinds of insurance on automobiles must maintain a reserve.[32]

32. State ex rel. American Automobile Ins. Co. v. Schramm, 271 Mo. 223, 196 S. W. 21 (1917).

CHAPTER II.

INSURABLE INTEREST.

SECTION.

16. In general.
17. What is an insurable interest.
18. When insurable interest must exist.
19. Contract of indemnity.
20. Statutory requirements.
21. Bill of sale.
22. Conditional sales.
23. Mortgagor and mortgagee.
24. Stolen car insured.

§ 16. In general.

What constitutes an insurable interest has been the subject of much discussion in the cases, and is often a question of great difficulty. It is quite apparent that the tendency of decisions in recent times is in the direction of a more liberal doctrine upon this subject than formerly prevailed. Contracts of insurance, where the insured had no interest, were permitted at common law,[1] but the manifest evils attending such contracts, and the temptation which they afforded to fraud and crime, led to the enactment in England of the statute[2] prohibiting wager policies, and this was followed by the enactment in the state of New York of a similar statute prohibiting wagers,[3] but to prevent the application of the statute to cases of insurance by way of security and indemnity it was provided that it should not be extended so as to prohibit nor in any way affect any insurance made in good faith for the security or indemnity of the party assured, and which are not otherwise prohibited by law. It would seem, therefore, that whenever there is a real interest to protect and a person is so situated with respect to the subject of insurance that its destruction

1. Cránfurd v. Hunter, 8 T. R. 13.
2. Stat. 19 Geo. 2, c. 37.
3. 1 Rev. Stat. 662.

would or might reasonably be expected to impair the value of that interest, an insurance on such interest would not be a wager within the statute, whether the interest was an ownership in, or a right to, the possession of the property, or simply an advantage of a pecuniary character having a legal basis, but dependent upon the continued existence of the subject. It is well settled that a mere hope or expectation, which may be frustrated by the happening of some event, is not an insurable interest.

§ 17. What is an insurable interest.

The test of insurable interest is whether insured will be directly and financially affected by loss of the property. If there is a right in or against the property which some court will enforce upon the property, a right so closely connected with it and so much dependent for value upon the continued existence of it alone that a loss of the property will cause pecuniary damage to the holder of the right in or against it, he has an insurable interest. It is an elementary rule that it is sufficient that insured has a direct pecuniary interest in the property, and that he need not have a good legal or equitable title. And it matters not whether the title is defective or even bad; provided the insured has possession and use it is held sufficient that the insured has a direct pecuniary interest in the property, and that he will suffer a pecuniary loss as an immediate result of its destruction. Possession by consent of the owner, with beneficial use of the property, has been held an insurable interest.[4]

§ 18. When Insurable interest must exist.

ASSURED MUST HAVE INSURABLE INTEREST AT THE TIME POLICY ISSUES AND AT TIME OF LOSS.

The insured has no insurable interest in an automobile unless he is the owner or has an interest therein at the time

4. Sunderlin on Fire Insurance, Lecture No. 2 on Insurable Interests; Page v. National Automobile Ins. Co. of Lincoln, 109 Neb. 127, 190 N. W. 213 (1922).

the policy is issued.[5] In a Massachusetts case, the applicant for policy of automobile fire insurance had sold the car before the policy was issued. Thereafter, he assigned the policy to the purchaser of the machine. But the policy was void from its inception, because the insured had no insurable interest in the car, and assignment of the policy to the purchaser transferred nothing.[6]

Where one obtains possession of automobile by representing himself and signing conditional bill of sale, as one to whom license for car taken in trade was issued, he is guilty of larceny under Washington state statute;[7] but there is no liability on the theft provision of the policy where the theft is complete before the policy takes effect.[8]

To recover on an automobile insurance policy, the plaintiff must prove that he had an insurable interest at the time of the loss.[9]

§ 19. Contract of indemnity.

The sole object of insurance is the indemnity of the insured, and if he has no insurable interest the contract is void. If one has no interest, legal or equitable, in the thing insured, the transaction is a mere wager and the contract will not be enforced.[10] A party has no insurable interest

5. Mowles v. Boston Insurance Co., 226 Mass. 426, 115 N. E. 666 (1917); O'Neill v. Queen Insurance Co. of America, 230 Mass. 269, 119 N. E. 678; Hessen v. Iowa Automobile Mutual Ins. Co., 195 Iowa 141, 190 N. W. 150 (1923), 30 A. L. R. 657; Hirsch v. City of New York Insurance Co., 218 Mo. App. 673, 267 S. W. 51 (1924); Bell v. Hanover Fire Ins. Co., 107 Or. 513, 214 Pac. 340, 215 Pac. 171 (1923); O. M. Gaudy, Inc. v. North Carolina Home Ins. Co., 145 Wash. 375, 260 Pac. 257 (1927); Cory v. International Indemnity Co., 124 Kan. 677, 261 Pac. 573 (1928).

6. Mowles v. Boston Insurance Co., 226 Mass. 426, 115 N. E. 666 (1917).

7. Rem. Comp. Stat., par. 2601 (Wash.).

8. O. M. Gaudy, Inc. v. North Carolina Home Ins. Co., 145 Wash. 375, 260 Pac. 257 (1927).

9. Gormley v. Westchester Fire Ins. Co., 256 Mass. 221, 152 N. E. 320 (1926); St. Paul Fire & Marine Ins. Co. v. McCoy, 38 Ga. App. 660, 145 S. E. 100 (1928).

10. Hessen v. Iowa Auto Mut. Ins. Co., 195 Iowa 141, 190 N. W. 150 (1923).

in a thing where his only right arises under a contract which is void or unenforceable either in law or in equity.[11]

§ 20. Statutory requirements.

INSURABLE INTEREST IS DEFINED AS SOME INTEREST IN PROPERTY OR EVENT INSURED, AND IS NOT SYNONYMOUS WITH "UNCONDITIONAL AND SOLE OWNERSHIP."

Insurable interest, defined as some interest in property or event insured, is not synonymous with "sole and unconditional ownership" as required by automobile fire insurance policy for recovery by insured.[12] Such a provision as contained in the automobile fire insurance policy is simply a matter of contract, and by the insertion of this provision in the policy the insurer and insured have simply contracted and agreed concerning the nature of the insured's right, title or interest in the automobile. So where state statute, for example, such as that in Georgia,[13] requires only slight or contingent interest for insurable interest, it does not dispense with requirement of automobile fire insurance policy that property insured shall not be incumbered.[14]

§ 21. Bill of sale.

A PURPORTED TRANSFER OF AUTOMOBILE WITHOUT EXECUTION OF VERIFIED BILL OF SALE, AS REQUIRED BY STATUTE, IS INVALID; AND THE ASSIGNEE HAS NO INSURABLE INTEREST TO SUPPORT POLICY OF INSURANCE THEREON.

CONTRA. BUT THE RULE IS OTHERWISE IN THE STATE OF TEXAS, WHERE THE COURTS HOLD THAT UNDER SUCH CIRCUMSTANCES THE TRANSFER IS NOT VOID, AND THE ASSIGNEE HAS AN INSURABLE INTEREST.

The rule which obtains in most jurisdictions is, that where a statute is enacted to protect the public against fraud or imposition, or to safeguard the public health or

11. Fiske v. Niagara Fire Ins. Co. (Dist. Ct. of Appeals, Calif.), 266 Pac. 853 (1928); Cory v. International Indemnity Co., 124 Kan. 677, 261 Pac. 673 (1928).

12. Alliance Ins. Co. v. Williamson, 36 Ga. App. 497; 137 S. E. 277 (1927).

13. Civ. Code 1910, par. 2472 (Ga.).

14. Alliance Ins. Co. v. Williamson, 36 Ga. App. 497; 137 N. E. 277 (1927).

morals, a contract which is entered into in violation of the statute and without conforming to its provisions is void. This is even true where a money penalty is attached, if the primary purpose of the statute is not for the raising of revenue.

Statutory provisions, which become *ipso facto* a part of every insurance policy must, of course, be complied with to protect rights of the insured under the policy, even though no specific mention thereof is made in the policy itself. One buying an automobile from any person other than an established dealer without requiring bill of sale in accordance with statutory requirements has no insurable interest in such automobile against its theft.[15] Where seller of an automobile executes and delivers to the purchaser a bill of sale describing the car and containing warrant of title, but makes no assignment on the back of the title certificate as required by statute, there is no substantial compliance with the statute giving the buyer title, and hence the buyer has no insurable interest in such automobile enabling him to sue the insurance company for its loss.[16]

The argument favorable to this rule is ably presented in a decision of the supreme court of the state of Ohio. An Ohio statute provided that sale or transfer of an automobile was not valid except that it was shown by executed and verified bill of sale. Husband sought to transfer automobile to his wife, which was thereafter insured against fire and theft. In an action to recover on the policy, the court said:

"The statute under consideration is not a revenue-raising measure. No fees of any consequence are paid or are payable. It was not designed to prevent the sale of automobiles. Its sole purpose was to prevent, in so far as possible,

15. Morris v. Firemen's Ins. Co. of N. J., 121 Kan. 482, 247 Pac. 852 (1926); Bradley v. Retailers' Fire Ins. Co., 126 Kan. 27, 267 Pac. 23 (1928); Morris v. Firemen's Ins. Co. of New Jersey, 121 Kan. 482, 247 Pac. 852, 52 A. L. R. 696.

16. State ex rel. Connecticut Fire Ins. Co., 306 Mo. 537, 268 S. W. 87, 37 A. L. R. 1456.

the stealing of automobiles, which, because of the opportunity to commit the crime and escape detection, unfortunately had to be classifiable as a near industry. The declaration of the general assembly which passed the act is that its purpose was and is to prevent traffic in stolen cars.

"In view of the requirement of the statute that a bill of sale shall be verified before it can have force and effect, how can it be successfully argued that no bill of sale shall be effect? Omission of action is not action. Nonperformance is not performance. Failure to do a thing is not the doing of it. The absence of a paper is not the equivalent of a paper. As title cannot pass without a verified bill of sale, and in this transaction no bill of any kind or character was executed by the donor or filed by the donee (plaintiff), how can it be claimed that at the time of the theft plaintiff was the sole and unconditional owner of the car, within the meaning of the policy?

"Conditions in policies are part of the consideration. For a small premium an insured obtains a large protection. A recovery on an insurance policy in the face of a violation of the provisions of the policy has the effect of penalizing the prudent and careful policyholders for the benefit of the careless and negligent one. This is so, since insurance companies are merely clearing house for their policyholders. Such companies primarily bring no property into the world. Insurance companies are trustees of an express trust, and the payment by the officers of such companies of questionable bills and charges is as reprehensible as would be the squandering of trust funds by bankers, administrators, guardians, or other trustees.

"Insurance contracts, as a rule, are plain. They follow standard forms. In some states policy forms are settled by statute. While Ohio has not provided a statutory form of policy, practically all policy forms in use in this state are in line with the accepted forms of other states. The one in suit is the standard form. Plaintiff under the law was required to know the contents of her policy. If in doubt as to its scope and extent, it was her duty to consult

someone who could advise her. An explanation to the agent of the company of her so-called ownership at the time he was directed by the husband to change the name of the insured would have resulted either in the cancelation of the policy, or in an accurate indorsement being made thereon. If the latter had been made, the company would have been estopped to plead the ownership clause. Thus, both parties would have been protected, and the loss of this car, which was stolen the next day after the indorsement was placed on the policy, would have been sustained by the party who, having full knowledge of the facts, assumed the risk. No fraud on the part of the company or its agent is pleaded, nor could any be set up under the conceded facts, and, this being so, the policy conditions must be respected. * * *

"This transaction is not like unto that of one who in good faith buys a car from another believed to be the owner, but who, in fact, is not the owner; for instance, a thief. In such case, the courts have allowed a recovery * * *. The case at bar is quite a different one, because plaintiff here knew, or was bound as a matter of law to know, that she had no title. She is not in position to assert her good faith, in view of the fact that she disobeyed the statute. In effect, she misrepresented her ownership of the car to the defendant. In the last above-cited case the purchaser violated no law and was allowed a recovery. In the case at bar, the plaintiff disobeyed the law, and therefore should not have a recovery. It is inconceivable that a person at one moment may defy the state, and in the next invoke its protecting care. One may not disobey a statute and thereafter ask the courts to give him the benefit conferred by such statute.

"It is suggested that there is a distinction between cases where the statute is merely directory and those where the statute is prohibitory. In the instant case it appears the statute is prohibitory, because a bill of sale can have no force and effect unless it is properly executed and filed for record with the clerk of court, and carries the imprint of the seal of the clerk."

The court held there was no right of recovery.[17]

But the rule is otherwise in the state of Texas, where a statute provided, among other things, that "it shall be unlawful to sell or trade any secondhand motor vehicle in this state without transferring by indorsement of the name of the person to whom said license fee receipt was issued by the tax collector and by physical delivery of the tax collector's receipt for license fee for the year that the sale or trade is made." In an action involving the construction of the statute in question, the plaintiff in error, W. F. Hennessy, purchased a second-hand automobile without demanding and receiving the license fee receipt or bill of sale, as provided for by statute, and thereafter sold the car to one Chisholm, retaining a mortgage on it to secure the payment of the notes executed to him by Chisholm in payment. After the sale to Chisholm, the defendant in error, Automobile Owners' Insurance Association, issued its insurance policy against fire and theft upon the car in the sum of $625 payable to plaintiff in error as mortgagee, as his interest might appear. After the issuance of the policy, and while the policy was in full force and effect, the car was stolen and destroyed by fire. Defendant in error refused to make payment under the policy, and suit was instituted by plaintiff in error seeking judgment for the amount due on his notes. The opinion of the court reads:

"The purpose for which this act was passed is clearly expressed in the caption of the bill. It is to prevent the theft of motor vehicles. We may not presume that the purpose was other than that expressed. Its purpose was not to prevent fraudulent sales and transfers. The theft of motor vehicles has no relation to sales and transfers, and can therefore furnish no ground for a legal inference that it was the intention of the legislature to prevent such sales and thereby render unenforceable contracts in regard to property. This it seems to us is clear. To ascribe to

17. Ohio Farmers' Insurance Co. v. Todino, 111 Ohio St. 274, 145 N. E. 25 (1924), 38 A. L. R. 1118.

the legislature the intention to do a thing which is wholly irrelevant to the purpose plainly expressed in the enactment itself would be doing violence to all rules of legal construction * * * we think it is manifest that the legislature had no intention to declare void sales made where the acts required are not performed." It was held that plaintiff in error, Hennessy, obtained title to the automobile when he purchased it in violation of the requirements of the act; that title passed to Chisholm on the sale to him. Plaintiff in error, Hennessy, had an insurable interest.[18]

§ 22. Conditional sales.

Conditional purchaser of an automobile has an insurable interest,[19] and it has been held that his interest is not limited to the amount of cash paid on the purchase price.[20] So conditional seller of truck endorsing notes of purchaser has an insurable interest as protection against liability on such notes.[21] Under conditional sale contract of an automobile where the policy is made in the name of the insured and carries a loss payable clause in favor of the vendors, such vendors are merely appointees under the loss payable clause of the policy of insurance covering the car; their right is measured by the right of the insured, and where the interest of the vendee is transferred to his wife under a decree awarding the automobile to her in divorce proceedings, his right is extinguished and the appointees cannot recover on the policy.[22] Such a change of ownership avoids the insurance where the policy contains provision prohibiting trans-

18. Hennessy v. Automobile Owners' Ins. Ass'n (Tex. Civ. App.), 282 S. W. 791 (1926), rev. 273 S. W. 1024.

19. Baker v. Northern Assur. Co., Ltd. of London Eng., 214 Mich. 540, 183 N. W. 61 (1921).

20. Vigliotti v. Home Ins. Co., 201 N. Y. S. 407, 206 App. Div. 398.

21. Union Ins. Soc. of Canton, Ltd. v. Sudduth, 212 Ala. 649, 103 So. 845 (1925).

22. Coffin v. Northwestern Mut. Fire Ass'n, Pac. 43 Idaho 1, 249 Pac. 89 (1926).

fer of insured's interest, other than by the death of the insured.[23]

§ 23. Mortgagor and mortgagee.

The seller of an automobile who has secured the unpaid purchase price by a mortgage on the car has such an insurable interest in it that he can, for the protection of his interest, take out a policy of insurance thereon, to the extent of the debt secured, separate and apart from the mortgagor or vendee or his interest therein, and regardless of any other security that he may hold.[24] For example, each may take out a separate policy of theft insurance without impairing the insurance of the other. Where the mortgagee takes out a theft policy to protect his own interest, and the mortgagor thereafter, without the knowledge or consent of the mortgagee, and without knowing that the mortgagee has secured his interest, takes out a theft policy solely to protect the interest of the mortgagor, it is not such a case of double insurance as invalidates the first policy issued to the mortgagee.[25]

§ 24. Stolen car insured.

It has been held that a policy of theft insurance on a stolen automobile, which the assured had purchased in good faith, is void, because the assured had no insurable interest;[26] but there are decisions to the contrary.[27]

23. Collin v. Northwestern Mut. Fire Ass'n, 43 Idaho 1, 249 Pac. 89 (1926).

24. Investors' Mortgage Co. v. Marine & Motor Ins. Co., 155 La. 627, 99 So. 486 (1924).

25. Thompson v. National F. Ins. Co. of Hartford, Conn., 48 S. D. 224, 203 N. W. 464 (1925).

26. Hessen v. Iowa Automobile Mutual Ins. Co., 195 Iowa 141, 190 N. W. 150, 30 A. L. R. 658 (1922); Gormley v. Westchester Fire Ins. Co., 256 Mass. 221, 152 N. E. 320 (1926).

27. Barnett v. London Assurance Corp., 138 Wash. 673, 245 Pac. 3 (1926); see Giles v. Citizens' Ins. Co. of Missouri, 32 Ga. App. 207, 122 S. E. 890 (1924).

CHAPTER III.

CONSTRUCTION OF THE POLICY.

SECTION.

25. Rules of construction.—In general.
26. Intention of parties.
27. Inconsistent provisions.
28. Forfeitures.
29. Failure to read policy.
30. Same—waiver.
31. Application.
32. Oral contracts.
33. (a) Consideration.
34. (b) Question of fact.
35. (c) Proof.
36. Parol evidence.
37. Binding slips.
38. Rider.
39. Illustrations. (a) Contradiction of policy.
40. (b) Recovery for collision damage.
41. (c) Miscellaneous.
42. Antedated transfer.
43. Renewal policy.
44. Acceptance.
45. Same—Contract of agent.
46. Correspondence.
47. Divisible contract.
48. For account of whom it may concern.
49. Assignment.
50. (a) Waiver.
51. (b) Right of action.
52. (c) Appeal and error.
53. Statute.
54. Same.—Statute of frauds.
55. What law governs.

GENERAL RULE. IT IS A WELL-SETTLED RULE OF CONSTRUCTION THAT WORDS ARE TO BE TAKEN IN THEIR COMMONLY UNDERSTOOD SENSE, AND IN CASE OF DOUBT THE INTENT OF THE PARTIES MUST BE TAKEN INTO CONSIDERATION.

INTENT. THE INTENTION OF THE PARTIES IS DETERMINED BY EXAMINATION OF THE INSTRUMENT, AND CONSTRUING EACH OF THE PROVISIONS SO AS TO GIVE EFFECT, IF POSSIBLE, TO THE WHOLE INSTRUMENT.

INCONSISTENT PROVISIONS. WHERE THE CONTRACT IS AMBIG-

UOUS OR UNCERTAIN, IT WILL BE CONSTRUED FAVORABLY TOWARD THE ASSURED SO AS NOT TO DEFEAT THE CLAIM OF INDEMNITY.

FORFEITURES. FORFEITURES ARE NOT FAVORED BY THE LAW, AND THE LANGUAGE OF THE POLICY WILL BE CONSTRUED TO PREVENT FORFEITURES, IF FAIRLY SUSCEPTIBLE OF SUCH CONSTRUCTION.

§ 25. Rules of construction. In general.

The automobile insurance contract or policy, generally speaking, is construed in like manner as all other written contracts. The policy of insurance, with its clauses, conditions and stipulations, is the agreement of the insurer and the assured, and the interests of the parties must be gathered from the language of the policy itself.[1] Every part of the contract should be considered in arriving at an interpretation thereof, and in ascertaining the true intent of the parties.[2] Such construction should, if possible, be put on the contract as will harmonize and give effect to all its provisions.[3]

§ 26. Intention of parties shall control.

The purpose of the court is that the intention of the parties shall control, and such intention shall be determined by the plain and unmistakable provisions of the policy-contract, and not to read into the contract any meaning or interpretation that cannot be borne out by the provisions of the contract itself.[4] The policy of insurance, with its

1. North British & Mercantile Ins. Co. v. Tye, 1 Ga. App. 380, 58 S. E. 110; French v. Fidelity & Casualty Co. of N. Y., 135 Wis. 259, 115 N. W. 869, 17 L. R. A. (N. S.) 1011.

2. N. Y. & P. R. S. S. Co. v. Aetna Ins. Co. (D. C.), 192 Fed. 212.

3. Dahms & Sons Co. v. German Fire Ins. Co., 153 Ia. 168, 132 N. W. 870, Ann. Cas. 1913D 1301.

4. Southern Casualty Co. v. Johnston, 24 Ariz. 221, 207 Pac. 987 (1922); Importers' & Exporters' Ins. Co. v. Jones, 166 Ark. 370, 266 S. W. 286 (1924); Liverpool & London Globe Ins. Co. v. Georgia Auto & Supply Co., 29 Ga. App. 334, 115 S. E. 138 (1922); Alexander v. Home Ins. Co. of Hawaii, 27 Haw. 326 (1923); Garford Motor Truck Co. v. Miller's National Insurance Co., 230 Ill. App. 622 (1923); Hoosier Mutual Automobile Ins. Co. v. Lanam, 79 Ind. App. 629, 137 N. E. 626 (1923); Cass v. Lord, 236 Mass. 430, 128 N.

clauses, conditions and stipulations, is the law of the insurer and the insured, and the interests of the parties must be gathered from the language used. The policy should be interpreted by the rules which are applicable to other written contracts for the purpose of ascertaining and giving effect to the real intention of the parties.[5] But the popular construction and usual significance accorded to an automobile insurance contract may be effected by custom.[6] The entire contents and subject matter will be considered, but specific words and phrases will not always be given their ordinary application, as that would necessitate restricted application.[7]

The rule that in construing the contract words will be given their ordinary and popularly accepted meaning does not prevent the court from considering the entire context and subject-matter in determining the meaning and application of specific words and expressions.[8]

Resort is to be made to the practical construction of the contract only where there is some degree of uncertainty or doubt in the language employed; and the construction which imports liability on the part of one party to the contract,

E. 716 (1920); Preston v. Aetna Ins. Co., 193 N. Y. 142, 85 N. E. 1006 (1908), 19 L. R. A. (N. S.) 133; Strombald v. Hanover Fire Ins. Co., 121 Misc. 322, 201 N. Y. S. 67 (1923); Great American Mutual Ins. Co. v. Jones, 111 Ohio St. 84, 144 N. E. 596 (1924), 35 A. L. R. 1023; McClung v. Pennsylvania Taximeter Cab Co., 25 Pa. Dist. 583 (1916); Pred v. Employers' Indemnity Corp., 112 Neb. 161, 198 N. W. 864 (1924); Bell v. American Insurance Co., 173 Wis. 533, 181 N. W. 733, 14 A. L. R. 179; Hyer v. Inter-Insurance Exchange of Automobile Club of Southern California, 77 Cal. App. 343, 246 Pac. 1055 (1926); Patterson v. Standard Accident Ins. Co., 178 Mich. 288, 144 N. W. 491, 51 L. R. A. (N. S.) 583, Ann. Cas. 1915A, 632; Colyer v. North American Accident Insurance Co., 230 N. Y. S. 473; Brady v. Norwich Union Fire Ins. Co., 47 R. I. 416, 133 Atl. 799 (1926); Johnson v. Glens Falls Ins. Co., 131 S. C. 253, 127 S. E. 14 (1925).

5. Crowell v. Maryland Motor Car Ins. Co., 169 N. C. 41, 85 S. E. 37 (1915), Am. Cas. 1917D, 50.

6. American Automobile Insurance Co. v. Baker (Tex. Civ. App.), 5 S. W. (2nd) 252.

7. National Fire Insurance Co. of Hartford, Conn. v. Elliott, (U. S. C. C. A.) 7 Fed. (2nd) 522, 42 A. L. R. 1121.

8. New Jersey Ins. Co. v. Young (C. C. A.), 290 Fed. 155 (1923).

which is put upon it by both parties who have acted upon it in accordance with such construction, will be adopted by the court.[9]

§ 27. Inconsistent provisions.

Contracts of insurance will not be subjected to any critical or technical interpretation. But if the policy is not entirely clear and is capable of two interpretations equally reasonable, that interpretation is adopted which is most favorable to the assured.[10]

As the policy is written in the words of the company, if not by statutory enactment, the contract, in case of doubt as to its meaning, will be construed so as not to defeat the claim of indemnity which, in making the contract, the insurer intended to secure.[11]

But the rule does not go so far as to ignore or nullify express and unequivocal agreements of the parties, nor

9. Fullerton v. United States Casualty Co., 184 Iowa 219, 167 N. W. 700, 6 A. L. R. 368 (1919).

10. American Surety Co. of New York v. Pauly, 170 U. S. 133, 144, 42 L. Ed. 977, 981, 18 Sup. Ct. Rep. 563; Fidelity-Phoenix Fire Ins. Co. v. Queen City Bus & Transfer Co. (C. C. A., 5th Cir.) 3 Fed (2d) 784 (1925); Illinois Automobile Ins. Exchange v. Southern Motor Sales Co., 207 Ala. 265, 92 So. 429, 24 A. L. R. 734; National Union Fire Ins. Co. v. Avant, 167 Ark. 307, 268 S. W. 20 (1925); United States Fidelity & Guaranty Co. v. Corbett, 35 Ga. App. 606, 134 S. E. 336 (1926); Kartinos v. John L. Walker Co., 227 Ill. App. 289 (1923); Griffin v. General Casualty & Surety Co., 231 Mich. 642, 204 N. W. 727 (1925); Montana Auto Finance Corp. v. British & Federal Fire Underwriters, 72 Mont. 69, 232 Pac. 198 (1924); Utterback-Gleason Co. v. Standard Acc. Ins. Co. of Detroit, 179 N. Y. S. 836 (1920); Hartigan v. Casualty Co. of America, 227 N. Y. 175, 124 N. E. 789 (1919); Allgood v. Hartford Fire Ins. Co., 186 N. C. 403, 119 S. E. 561 (1923), 30 Ann. L. R. A. 652, Crowell v. Maryland Motor Car Ins. Co., 169 N. C. 35, 85 S. E. 37 (1915), Am. Cas. 1917D, 50; Great American Mutual Indemnity Co. v. Meyer, 18 Ohio App. 97 (1924); Jaloff v. United Automobile Indemnity Exchange, 120 Or. 381, 250 Pac. 717 (1926); Primrose v. Casualty Co. of America, 67 The Legal Intelligencer 308, 37 Pennsylvania County Court Reports, 411 (1910); Kunkle v. Union Casualty Co., 62 Pa. Sup. Ct. 114 (1916); Phoenix Ins. Co. v. American Trust & Savings Bank (Tex. Civ. App.), 248 S. W. 819 (1923).

11. Fireman's Fund Ins. Co. v. Globe Nav. Co., 236 Fed. 618, 149 C. C. A. 614; Federal Ins. Co. v. Hiter, 164 Ky. 743, 176 S. W. 210, L. R. A. 1915E. 575; Crowell v. Maryland Motor Car Ins. Co., 169 N. C. 41, 85 S. E. 37 (1915), 1917D, 50.

can it be construed to change the nature of the contract, but only to resolve an uncertainty or ambiguity in favor of the party likely to be misinformed or imposed upon.[12]

Where words are so used in contract of insurance that their meaning is ambiguous, or susceptible of two interpretations differing in import, that interpretation which will sustain claim of policyholder and cover loss should be adopted.[13] So, if two provisions of a policy are in conflict with each other, or susceptible of two interpretations, that interpretation will be given which will furnish the insured that protection for which he paid.[14] Where two interpretations of ambiguous clause of the insurance contract are fairly and reasonably possible, and one of them will render extent of insurer's liability indifinite and uncertain, that interpretation which will not involve rights of parties in doubt or uncertainty should be preferred.[15] But where the terms of the policy are capable of two meanings, or the direct meaning is left in doubt, the law fixes such construction as will protect the insured and does not lend a willing interpretation that will void the policy. The court may not read into the contract of insurance conditions omitted by the company in order to exempt it from liability.[16]

§ 28. Forfeitures.

While it is true that courts will construe the language

12. Hartigan v. Casualty Co. of America, 227 N. Y. 175, 124 N. E. 789 (1919), rev'g 178 App. Div. 942, 165 N. Y. S. 894, aff'g 161 N. Y. S. 145; Fullerton v. United States Casualty Co., 184 Iowa 219, 167 N. W. 700 (1919), 6 A. L. R. 368; Standard Automobile Insurance Ass'n v. Neal, 199 Ky. 699, 251 S. W. 966, 25 A. L. R. 1468 (1923); Dickinson v. Maryland Casualty Co., 101 Conn. 369, 125 Atl. 866 (1924), 41 A. L. R. 501.

13. Stovall v. New York Indemnity Co. (Tenn.), 8 S. W. (2nd) 473 (1928).

14. Federal Ins. Co. v. Hiter, 164 Ky. 743, 176 S. W. 210 (1915), L. R. A. 1915E, 575.

15. Stovall v. New York Indemnity Co. (Tenn.), 8 S. W. (2nd) 473; Security Ins. Co. v. Sellers-Sammons-Signor Motor Co. (Tex. Civ. App.), 235 S. W. 617 (1921); Automobile Underwriters of America v. Radford (Tex. Civ. App.), 293 S. W. 869 (1927), aff'd 299 S. W. 852.

16. Witt v. Continental Casualty Co. (C. P., Alleghany County, Pa.) 70 Pittsburg Legal Journal, 586.

of an insurance policy, and especially a clause of forfeiture, most strongly against the insurer and in such language as to protect the insured, if the language used is susceptible of such construction, it is also true that when a party dealing with an insurance company has made a contract which is ambiguous in its terms, courts will construe and enforce it in the same way as if made between natural persons.[17] The court is not at liberty to extend by construction the language used by the parties to their contract.[18] But forfeitures are not favored by the law and the language of an insurance policy will be construed to prevent forfeitures if fairly susceptible of such construction.[19]

If there is a contradiction between the printed and the written portions of the policy, the latter will govern.

§ 29. Failure to read policy.

Though insured fails to read his policy but accepts and keeps it until there is a loss, he is bound by the contract which he voluntarily enters into. In absence of fraud[20] or mistake, insured will be held to knowledge of conditions of the policy.[21] So insured's negligence in failing to read his policy does not render it less binding, as the company has a right to assume that insured assented to its terms without reading.[22] But insured can rely on the presumption that the policy he receives is in accordance with his application so that insured by failure to observe misstate-

17. Interstate Fire Insurance Co. v. Sorrells (Tex. Civ. App.), 295 S. W. 242 (1927).

18. Schenectady Varnish Co. v. Automobile Insurance Co. of Hartford, Conn. (N. Y. S. C.), 127 Misc. 751, 217 N. Y. S. 504 (1926).

19. Security Insurance Co. v. Sellers-Sammons-Signor Motor Co. (Tex. Civ. App.), 235 S. W. 617 (1921); Welch v. British American Assurance Co., 148 Cal. 223, 82 Pac. 964, 113 Am. St. Rep. 223, 7 Ann. Cas. 396.

20. Cass v. Lord, 236 Mass. 430, 128 N. E. 716 (1920).

21. Serbinoff v. Wolverine Mut. Motor Ins. Co., 242 Mich. 394, 218 N. W. 776.

22. Davern v. American Mutual Liability Ins. Co., 241 N. Y. 318, 150 N. E. 129, aff'g 214 App. Div. 754, 209 N. Y. S. 818 (1925); Hubbard v. Ohio Farmers' Ins. Co. of Le Roy, Ohio, 224 App. Div. 249, 229 N. Y. S. 678; Home Ins. Co. v. Bennett (Tex. Civ. App.), 9 S. W. (2d) 432.

ments in the warranties placed by the insurance company's agent in the policy does not avoid the policy on the theory of *caveat emptor*.[23]

§ 30. Failure to read policy. Waiver.

The general rule is that there is no waiver of the provisions of a policy or rider thereto simply because the insured fails to read the policy, for he is bound by the terms of the contract which he has voluntarily entered into.[24] For example, in an action on a fire policy in the state of Washington, the application for insurance covering the automobile was made a part of the policy, and thereby became a warranty. It bore the instruction "read your policy." It was held that under such circumstances, by retaining the policy, the insured became responsible for all statements contained in the application, even though they were written in by the insurer's agent.[25]

§ 31. Application.

An application for automobile insurance does not constitute in itself a contract. It is a mere proposal. There is no meeting of the minds to effect a contract until the application is accepted and approved by the insurer.[26]

23. Northwestern National Ins. Co. v. Chambers, 24 Ariz. 86, 206 Pac. 1081 (1922).

24. Glaser v. Williamsburg City Fire Ins. Co., 72 Ind. App. 319, 125 N. E. 787 (1920); Standard Automobile Ins. Ass'n v. Neal, 199 Ky. 699, 251 S. W. 966 (1923); Snyder v. Wolverine Mutual Motor Ins. Co., 231 Mich. 692, 204 N. W. 706 (1925).

25. Hayes v. Auto Ins. Exch., 126 Wash. 487, 218 Pac. 252 (1923); reargument, 129 Wash. 202, 224 Pac. 594; see Day v. St. Paul Fire & Marine Ins. Co., 111 Wash. 49, 189 Pac. 95.

26. Johnson v. Home Mutual Ins. Ass'n, 191 Iowa 535, 181 N. W. 244 (1921); Maryland v. L. R. Christenson Co., 149 Minn. 65, 182 N. W. 251 (1921); Stuyvesant Ins. Co. v. A. C. Smith Motor Sales Co., 135 Miss. 585, 99 So. 575 (1924); Page v. National Automobile Ins. Co. of Lincoln, 109 Neb. 127, 190 N. W. 213 (1922); Fodor v. National Liberty Ins. Co., of America, 175 N. Y. S. 112 (1919); Cranston v. California Insurance Co., 94 Or. 369, 185 Pac. 292 (1919); Waitsman v. Northwestern National Ins. Co., 77 Pa. Superior Ct. 593 (1921); Davis v. Home Insurance Co., 125 S. C. 381, 118 S. E. 536

§ 32. Oral contracts.

An oral contract of automobile insurance is legal and binding, the same as written, in the absence of any statutory enactment to the contrary.[27]

The legal effect is to obligate the insurer according to terms of ordinary policy issued by it.[28] So, the resident agent of foreign insurance company may bind principal by oral contract.[29] And an agent's agreement to procure insurance is mutually binding and when supported by consideration is valid and enforceable.[30] But a policy having been reduced to writing cannot be added to, limited, or otherwise varied by the showing of a parol contemporaneous agreement,[31] unless it was omitted by reason of fraud or mistake from the contract. Even though an automobile insurance contract may be legally entered into by oral agreement, it must be shown, nevertheless, that the agent of the insurer has authority to make the contract.[32] But clearly the insurer is not liable for injury to an insured car even though the company would be legally bound by an oral contract entered into by an authorized agent of

(1923); Camden Fire Ins. Co. v. Hill (Tex. Com. App.), 276 S. W. 887 (1925), rev. 264 S. W. 123; Holdaway v. British Crown Assur. Corp., Ltd., 3 Dom. L. R. 269, 280 (1925).

27. National Liberty Ins. Co. of America v. Milligan, 10 Fed. (2nd) 483; Smith v. Massachusetts Bonding & Ins. Co., 71 Cal. App. 661, 236 Pac. 176 (1925); Week v. Federal Auto. Ins. Assn, 239 Ill. App. 510 (1926); Cass v. Lord, 236 Mass. 430, 128 N. E. 716 (1920); Sheridan v. Massachusetts Fire & Marine Ins. Co., 233 Mass. 479, 124 N. E. 249 (1918); Mowles v. Boston Ins. Co., 226 Mass. 426, 115 N. E. 666 (1917); O'Neill v. Queen Ins. Co. of America, 230 Mass. 269, 119 N. E. 678 (1918); Johnson v. Yorkshire Insurance Co., 224 Mich. 493, 195 N. W. 45 (1923); Eckert v. Joice, 152 Minn. 440, 189 N. W. 125 (1922); Goodman v. Royal Indemnity Co., 24 Ohio App. 357, 157 N. E. 311 (1927); Salquist v. Oregon Fire Relief Ass'n, 100 Or. 416, 197 Pac. 312 (1921).

28. Serri v. National Surety Co., 124 Misc. 450, 208 N. Y. S. 257; Karelson v. Sun Fire Office of London, 122 N. Y. 545, 25 N. E. 921.

29. Corrigan v. Nat. Motor Underwriters (Mo. App.), 1. S. W. (2d) 845.

30. Cass v. Lord et al., 236 Mass. 430, 128 N. E. 716 (1920).

31. Taxicab Motor Co. v. Pacific Coast Casualty Co., 73 Wash. 631, 132 Pac. 393 (1913).

32. Week v. Federal Automobile Ins. Ass'n, 239 Ill. App. 510 (1926).

the insurer where the car was damaged prior to the date of the agreement.[33]

§ 33. Oral contracts. (a) Consideration.

An oral agreement must be supported by a consideration. Thus it was held in a Massachusetts case where it was contended there was an oral agreement between the agent of an insurer and the brother of the owner of the insured car that the owner would be substituted as insured in place of the brother, who had no interest in the insured car, such an oral agreement was not binding because it was without consideration. The court pointed out that the agreement between the parties contemplated the delivery of either a new policy or attaching a rider to the original, and it was the duty of the brother who was the actual owner of the car to see that within a reasonable time the oral understanding was consummated.[34]

§ 34. Oral contracts. (b) Question of fact.

To constitute an oral contract, there must be a meeting of minds of the parties, and that is a question of fact. For example, in a New York case, there was evidence that the plaintiff's agent applied to the defendant's agent for the insurance before the date in question, and that the defendant's agent told him then, and also at a later date, that the insurance was all right. The court held it was a question of fact whether there was a meeting of minds.[35]

§ 35. Oral contracts. (c) Proof.

While a parol contract of automobile insurance may be made, proof of such an agreement must be clear and convincing, because automobile insurance is ordinarily obtained by the issuance of elaborate written contracts.[36] In the

33. Week v. Federal Automobile Ins. Ass'n, 239 Ill. App. 510 (1926).
34. O'Neill v. Queen Ins. Co., 230 Mass. 269, 119 N. E. 678 (1918).
35. Fodor v. National Liberty Ins. Co., 175 N. Y. S. 112 (1919).
36. Week v. Federal Automobile Ins. Ass'n, 239 Ill. App. 510 (1926); O'Neill v. Queen Insurance Co. of America, 230 Mass. 269, 119 N. E. 678 (1918);

case of an oral contract, it is presumed that the statutory or usual form is applicable.[37]

§ 36. Parol evidence.

WRITTEN AGREEMENT CANNOT BE VARIED BY PAROL EVIDENCE OF CONTEMPORANEOUS ORAL AGREEMENT.

In the absence of fraud or mistake, the general rule is applied that parol evidence is not admissible to vary the terms of the written contract. Thus, where written contract of sale provided for refund of any reduction in price before delivery, and that no agreements other than those contained therein would be recognized, a collateral oral agreement by the seller's agent was not admissible in evidence to vary the written contract.[38]

§ 37. Binding slips.

Pending the delivery of the automobile insurance policy, the insurer, as a receipt or memorandum, may issue a "binding slip" to evidence the contract; and this is true even though there exists a statutory form of automobile insurance policy. The effect of the binding slip is to evidence the making of the contract, and to make effective the liability of the insurer from the time the binding slip or memorandum is delivered to the assured, until the policy is issued and delivered. The binding slip, then, is an instrument given to the assured, which binds the insurer to pay the insurance loss should fire occur while the policy is being prepared. It represents a definite and binding contract.[39] It is not a mere agreement to insure, but a present

Mowles v. Boston Insurance Co., 226 Mass. 426, 115 N. E. 666 (1917); Johnson v. Yorkshire Insurance Co., 224 Mich. 493, 195 N. W. 45 (1923); Camden Fire Ins. Co. v. Hill (Tex. Civ. App.), 276 S. W. 887 (1925), rev. 264 S. W. 123; American Can Co. v. Agricultural Ins. Co. of Watertown, N. Y., 12 Cal. App. 135, 106 Pac. 720.

37. Johnson v. Yorkshire Insurance Co., 224 Mich. 493, 195 N. W. 45 (1923).

38. Auto Outing Co. v. McFrederick, 146 Md. 106, 125 Atl. 886.

39. Jones v. International Indemnity Co., 39 Cal. App. 708, 179 Pac. 692 (1919); Cass v. Lord, 236 Mass. 430, 128 N. E. 716 (1920); Kerr v. Union Marine Ins. Co. (D. C. N. Y.), 124 Fed. 837; Law v. Northern Assurance Co., 165 Cal. 394, 132 Pac. 590.

contract of insurance for the amount specified therein. Thus in a California case, the cover note was signed but not delivered. It purported to take effect prior to the date of that occurrence, and the court concluded the evidence established it was the memorial of a prior oral contract for such a cover note agreed to in its essentials and which the parties intended should take effect as stated in the note. The court ruled that a cover note issued by an indemnity company and countersigned by the company's duly authorized representative, as policies were required to be before becoming effective, being the memorial of a prior oral contract of indemnity of insurance which the parties intended to take effect as stated in the note, was itself a contract of present insurance.[40]

§ 38. Rider.

A RIDER IS AN INTEGRAL PART OF THE POLICY, AND IF INCONSISTENT WITH THE POLICY PROPER, THE RIDER WILL GOVERN.

A rider, properly attached to a policy, modifying or explaining its provisions, will be considered a part of the contract, and given due effect in the construction of the policy. If inconsistent with the printed matter, the rider will usually govern.[41] For example, in a New York case, where a rider was attached to an automobile policy indemnifying the owner against collision loss, the court held that the rider became an integral part of the policy for

40. Jones v. International Indemnity Co., 39 Cal. App. 708, 179 Pac. 692 (1919).

41. Pennsylvania Fire Ins. Co. v. Johnson, 28 Ariz. 448, 237 Pac. 634 (1925); Cass v. Lord, 236 Mass. 430, 128 N. E. 716 (1920); Union Insurance Soc. of Canton v. De Salvo, 17 Ohio App. 477 (1923); Stallani v. Belt Auto Indemnity Ass'n, 85 Pa. Sup. Ct. 224 (1925); Schuylkill Transportation Co. v. London Guarantee & Accident Co., 285 Pa. 91, 131 Atl. 701 (1926); MacClellan v. General Casualty & Surety Co., 103 N. J. L. 702, 134 Atl. 911 (1926); Gaudy v. North American Home Ins. Co., 145 Wash. 375, 260 Pac. 257 (1927); Corporation of Roman Catholic Church of Eunice v. Royal Ins. Co., 104 So. 383, 158 La. 601; Union Ins. Soc. of Canton v. De Salvo, 17 Ohio App. 477.

which the insurer assumed liability in the event of a collision loss.[42]

§ 39. Illustrations. (a) Contradiction of policy.

An automobile fleet policy provided that the insured busses would be covered while in operation. A rider was thereafter attached to the policy that it did not cover a specified car, but the rider was used as a matter of book record. The real agreement was as stated in the policy itself. Under an oral agreement, the rider was effective only while the car in question was not in use. The car was put back into operation, but because of an oversight on the part of the assured, no notice was given to the insurer. Even though there was a contradiction of the policy by the rider, the court held that the assured could recover for damage to the car.[43]

§ 40. Illustrations. (b) Recovery for collision damage.

The amount of recovery on an automobile insurance policy for fire only was $1,000. The premium was $5.50. A rider was attached which purported to provide full coverage for damages suffered to the automobile by collision. The additional premium was $62. It was held that the rider became a part of the policy, and, in case of accidental collision resulting in damage to the insured car, the amount of recovery was not limited to $1,000.[44]

§ 41. Illustrations. (c) Miscellaneous.

(1) Automobile policy insuring against "liabilities" as well as "losses" was held to be for indemnity only, since specific provision of riders limiting obligation to actual loss or damage or money loss prevails over general pro-

42. Davern v. American Mutual Liability Ins. Co., 241 N. Y. 318, 150 N. E. 129 (1925), aff'g 214 App. Div. 754, 209 N. Y. S. 818.

43. Schuylkill Transportation Co. v. London Guarantee & Accident Co., 285 Pa. 91, 131 Atl. 701 (1926).

44. Union Insurance Soc. of Canton v. De Salvo, 17 Ohio App. 477 (1925).

vision of policy.[45] (2) A rider attached to automobile insurance policy issued jointly to vendor and vendee, which insured vendor only and required additional premium was new and different contract from the policy except where conditions of policy were harmonious to those of rider.[46] (3) But, an automobile rider attached to policy in consideration of payment of additional premium and giving additional insurance, is governed by rule of construction that when policy is susceptible to two interpretations, the one favorable to assured will be preferred.[47]

§ 42. Antedated transfer.

An endorsement by agent on policy insuring against liability on account of injury caused by automobile of its transfer to a different car and the dating of the transfer back to a prior date, does not impose liability on insurer for injury caused by substituted car previous to actual transfer and not at the time known to either company or agent.[48]

§ 43. Renewal policy.

The renewal of an insurance policy on an automobile is impliedly made on the basis that the statements in the original proposal are still accurate.[49]

§ 44. Acceptance.

Even though an automobile dealer fails or neglects to sign the written contract of sale, which is signed by the buyer, the contract is accepted by the dealer upon delivery of the car.[50]

45. Ducommun v. Strong and Interstate Exchange, 193 Wis. 179, 212 N. W. 289.

46. Pennsylvania Fire Ins. Co. v. Johnson, 28 Ariz. 448, 237 Pac. 634 (1925).

47. Wright v. Aetna Life Ins. Co. (U. S. C. C. A.), 10 Fed. (2nd) 281.

48. Downs v. Georgia Casualty Co. (U. S. D. C.), 271 Fed. 310.

49. In re Wilson & Scottish Ins. Corp., Ltd., (Ch. Div.) 2 Chancery, The Law Reports (1920).

50. Automobile Outing Co. v. McFrederick, 146 Md. 106, 125 Atl. 886.

§ 45. Acceptance. Contract of agent.

Where an agent had a form of agreement for sale of automobiles in which a clause regarding a reduction of price before delivery was clearly set out and other agreements were expressly excluded, and the contract was not effective until it had been accepted by the principal, the agent had no authority to make an additional oral agreement regarding refund of price. An oral agreement by the salesman to extend the time provided in the contract for a refund or reduction in the price was without consideration, unauthorized and not binding on the principal.[51] The fact that the dealer, on hearing of such oral agreement, said he would see what could be done with the factory, without agreeing to or repudiating it did not constitute an acceptance.

§ 46. Correspondence.

Letters may become a part of the automobile contract of insurance where they are written by the insurer as to what the policy will cover, and such letters are relied on by the assured.[52]

§ 47. Divisible contract.

The insurer is liable for fire loss on a combination fire and theft policy, even though at the time of the fire the automobile insured is in the possession of a thief.[53] The contract as to fire and theft is divisible, and where Texas statute avoids provisions for non-liability in case of encumbrances, though such provision is not applicable to theft, the provision as to encumbrances will be treated as void, and it is no defense to a recovery for fire that the car at the time was in a thief's possession who stole it before the fire occurred.[54]

51. Automobile Outing Co. v. McFrederick, 146 Md. 106, 125 Atl. 886.

52. Buxton v. International Indemnity Co., 47 Cal. App. 583, 191 Pac. 84 (1920).

53. International Ind. Co. v. Duncan (Tex. Civ. App.), 254 S. W. 233 (1923).

54. International Ind. Co. v. Duncan (Tex. Civ. App.), 254 S. W. 233 (1923).

Where blanket policy covered a number of cars against fire but each car was individually described and valued by separate notes attached to the policy, each note was a separate contract of insurance and was binding only on payment of premium and issuance of note.[55]

§ 48. For account of whom it may concern.

It has been held that the words "for account of whom it may concern" in contract to insure cars sold by automobile sales corporation, for one year after date of retail sale, did not effect the personal quality of the contract.[56]

§ 49. Assignment.

An assignee of an automobile insurance policy has no greater rights than his assignor.[57] Thus, where a theft insurance policy was taken out by one who had no insurable interest in the insured automobile, and assigned, with the consent of the insurer, to the owner of the insured car, no valid contract of insurance resulted therefrom.[58]

An assignment of an automobile theft insurance policy before the expiration of the sixty day period for payment of the loss does not give to the assignee any vested right in the automobile, if it is recovered.[59]

§ 50. Assignment. (a) Waiver.

An assignment of a claim under an automobile theft insurance policy will not defeat the assured's right of recovery where the insurer had recognized the validity of the claim by making an offer of settlement.[60]

55. Walker v. Fireman's Fund Ins. Co., 114 Ore. 545, 234 Pac. 542 (1925).

56. Chrysler Sales Corporation v. Spencer, Insurance Commissioner (U. S. D. C.), 9 Fed. (2nd) 674 (1926).

57. Buell v. United Firemen's Ins. Co., 167 Minn. 183, 208 N. W. 819 (1926).

58. O'Neill v. Queen Ins. Co. of America, 230 Mass. 269, 119 N. E. 678 (1918).

59. Louis Geyler Co. v. Baker, 15 Ill. Law Review, Appellate Court Digest, 135 (1921).

60. Campbell v. National F. Ins. Co. (Mo. App.), 269 S. W. 645 (1924).

§ 51. Assignment. (b) Right of action.

Purchaser of an automobile has no right of action on fire and theft insurance policy which was issued on the car eight months prior to the time when he purchased it, where there had been no transfer or assignment to him.[61]

§ 52. Assignment. (c) Appeal and error.

HARMLESS ERROR.

Error was technical and harmless for the reason that the real party plaintiff would be estopped to question the rendition of judgment in favor of his assignee resting on the parol agreement in a subsequent action on the insurance policy, or in the attempt of any person to question the payment to the substitute plaintiff.[62]

§ 53. Statute.

The automobile insurance policy is construed not only by examination of the instrument itself and by resort to parol evidence when such evidence is competent, but also by reference to existing statutes of the state when and where applicable. Statutory enactments are part and parcel of every contract of insurance. In the event that there is anything written into the policy, whether it operates in favor of either the insurer or insured, if it contravenes the law of the state or is violative thereof, to that extent the policy-contract has no force or effect, and is null and void. In other words, statutory provisions automatically read themselves into the insurance contract, when applicable to the subject matter.[63] For example, (a) statement in schedule that car was owned by insured does not avoid policy, where

61. Indemnity Co. of American v. Mahaffey (Tex. Civ. App.), 231 S. W. 861 (1921).

62. Automobile Ins. Co. of Hartford v. Lewis, 93 Okla. 280, 220 Pac. 639, 35 A. L. R. 1463 (1923).

63. Bacot v. Phoenix Ins. Co. of Brooklyn, 96 Miss. 223, 241, 50 S. 729, 25 L. R. A. (N. S.) 1226, Ann. Cas. 1912B, 262; Scottish Union and National Ins. Co. v. Warren Gee Lumber Co., 118 Miss. 740, 757, 80 S. 9; Larkin v. Glens Falls Ins. Co., 80 Minn. 527, 83 N. W. 409, 81 Am. S. R. 286.

statute provides that erroneous statement of fact must be made with intent to deceive;[64] (b) statute requiring provision in indemnity policy enabling injured persons' personal representative to sue insurer after judgment against insured is part of policy;[65] (c) by virtue of a statute a condition in a policy of insurance which would require payment by the assured of loss of damage occasioned by a casualty as a condition precedent to the recovery of the liability under such policy of insurance, would be null and void;[66] (d) any contract tending to interfere with law enforcement or to offer to violate law or indemnifies law violators against consequence of their illegal acts is void;[67] (e) but where subject matter of contract is not illegal, there is presumption that parties intend a legal contract and do not contemplate a violation of law.[68]

§ 54. Statute. Statute of frauds.

The statute of frauds, as enacted by the states, usually provides that an agreement, or some memorandum thereof, that by its terms is not to be performed within a year from the making, must be in writing. The insurance contract, however, is not construed as coming "within the statute of frauds," and consequently the insurance contract may be entered into orally and by word of mouth. Even though it may be agreed by and between the agent of the insurer and the assured that the insurance contract shall be for a period of several years, nevertheless the courts construe such contracts not to come within the statute of frauds, for the reason that even though written for a period of more than one year, the happening of the event for which the contract was entered into might terminate the contract.

64. Rem. Comp. Stat., par. 7078; Lindstrom v. Employers' Indemnity Corp., 146 Wash. 484, 263 Pac. 953 (1928).

65. Pigg v. International Ind. Co., 54 Cal. App. 841, 261 Pac. 486 (1927) (St. 1919, p. 776).

66. Stacey v. Fidelity & Casualty Co. of N. Y., 114 Ohio 633; 151 N. E. 718, aff'd 21 Ohio App. 70, 152 N. E. 794.

67. Fidelity & Deposit Co. v. Moore (Ore. D. C.), 3 Fed. (2nd) 652 (1925).

68. Fidelity & Deposit Co. v. Moore (Ore. D. C.), 3 Fed. (2nd) 652 (1925).

The loss under the policy might be payable within the year. Then it would not be a contract necessarily that was "not to be performed within one year." The statute of frauds, therefore, does not apply to the insurance contract.

§ 55. What law governs.

The general rule is that the construction of contracts of insurance is governed by laws of the state where the contract is made. Thus it has been held in a Rhode Island case that a contract of automobile insurance made in a certain state is to be construed according to the laws of that state.[69] In the absence of any act of stipulation of the parties indicating a different intent, the place of contract is the place of delivery and payment of the premium.

69. Brady v. Norwich Union Fire Insurance Co., 47 R. I. 416, 133 Atl. 799 (1926).

CHAPTER IV.

AGENCY AND BROKERAGE.

SECTION.

(A) AGENCY.

56. Agent defined.
57. Agent represents insurer.
58. Appointment.
59. Authority of agent.
60. Soliciting agent.
61. Local agent with limited authority.
62. Dealer as agent.
63. Same—Dealer acting without the scope of his employment.
64. Agent may act for insured.
65. Right of action.
66. Termination of agency.
67. Jury.
68. Statute.
69. Adjuster.
70. Authority limited by policy.
71. Illustrations. (a) apparent authority.
72. (b) Special instructions.
73. (c) Ratification.
74. (d) Evidence.

(B) BROKERAGE.

75. Broker defined.
76. In General.
77. Illustrations. (a) Binder
78. (b) Application made to broker.
79. (c) Assured liable for conduct of broker.
80. Oral agreement.
81. Broker as agent of insurer.
82. For collection of premium.
83. Jury.

(A) AGENCY.

AN AUTOMOBILE INSURANCE AGENT GENERALLY REPRESENTS THE INSURER.

WHETHER AN AGENT HAS GENERAL OR PARTICULAR POWERS IS TO BE DETERMINED NOT BY THE NAME BY WHICH HE IS CALLED, BUT BY THE AUTHORITY WHICH HAS BEEN DELEGATED TO HIM.

GENERAL AGENT. AN AGENT, WHO UNDER INSTRUCTIONS FROM THE HOME OFFICE, REPRESENTS THE COMPANY IN A CERTAIN TERRITORY WITH FULL POWER TO SIGN, DELIVER AND CANCEL POLICIES AND COLLECT PREMIUMS IS A GENERAL AGENT.

§ 56. Agent defined.

The term "agent" is defined by section 142 of the Insurance Laws of the state of New York, as follows:

"The term 'agent' in this section shall include an acknowledged agent or any person, partnership, association or corporation who shall in any manner aid in transacting the insurance business of any underwriter, incorporated or unincorporated, by negotiating for or placing risks or delivering policies or collecting premiums, but shall not include the officers and salaried employees of any such underwriter, who do not receive commissions."

An agent has been defined in the state of Washington as a person duly appointed and authorized by an insurance company to solicit business.[1]

§ 57. Agent represents insurer.

An insurance agent generally represents the insurer.[2]

§ 58. Appointment.

The agent's appointment may be express or implied. It may be effected by a contract of employment, or by request of the principal for performance of an act followed by the entrance of the agent upon the performance. Unless otherwise provided by statute, authority for any purpose except the execution of an instrument under seal may be conferred upon an agent by deed, by writing, by word of mouth, or by conduct. A corporation may contract and may confer authority upon agents for the performance of an act within the scope of its corporate powers in the same

1. Washington Statutes, Rem. Code 1915, secs. 6059-2, cited in Day v. St. Paul Fire & Marine Ins. Co., 111 Wash. 49, 189 Pac. 95 (1920).

2. National Union Fire Ins. Co. v. Crabtree, 151 Ark. 561, 237 S. W. 97 (1922); Browne v. Commercial Union Assur. Co. of London, Eng., 30 Cal. App. 547, 158 Pac. 765 (1916); Standard Automobile Ins. Ass'n v. Henson, 201 Ky. 230, 256 S. W. 414 (1923); Ames v. Automobile Owners Ins. Co., 225 Mich. 44, 195 N. W. 686 (1923); Andrews v. Bulldog Automobile Fire Ins. Ass'n (Mo. App.), 258 S. W. 714 (1924); Carroll v. Union Marine Ins. Co., Ltd. of Liverpool (Mo. App.), 249 S. W. 691 (1923); Lock v. Neel Co., 84 Pa. Superior Court 130 (1924); Graham v. Standard Fire Ins. Co., 119 S. C. 218, 112 S. E. 88 (1922).

manner as an individual may do, and an appointment of an agent may be based upon an implication or logical inference from the words or conduct of the principal.

§ 59. Authority of agent.

Whether an agent has general or only particular powers is not determined by simply calling him a local agent.[3] An agent who, under general instructions from the home office, has authority, within a certain territory, to deliver policies and receive premiums, is a general agent.[4] A local agent having ostensible general authority to solicit applications and make contracts for insurance, and to receive first premiums, binds his principal by any acts or contracts within the general scope of his apparent authority, notwithstanding an actual excess of authority.[5] Local agent acts within the scope of his authority in ascertaining value and model of car before obtaining insurance.[6] But the local agent, with authority to issue policy, has no authority to bind company by waiver or estoppel after loss.[7] It has been held, however, in an Illinois case, that where the automobile salesman, to whom the insured paid the premium, at the same time had paid for the car, had a rate book of the insurance company, quoted rates of insurance for the company to the insured, and accepted his application for insurance, the salesman was an agent of the company for the purpose of the insured's giving notice of loss of the car by theft to the company.[8] An insurance agent acting within the scope of his general authority, in consideration of the premium paid, can bind the insurer to transfer the policy from the name of one partner to another, where an

3. Murphy v. Ins. Co., 3 Baxt. 448.

4. Insurance Co. v. Booker, 9 Heisk. 606.

5. Insurance Co. v. Wilkinson, 13 Wall. 234; Wheaton v. Ins. Co., 76 Cal. 415, 18 Pac. 758; National Mutual Fire Insurance Co. v. Barnes, 41 Kan. 161, 21 Pac. 165; Rivara v. Queen's Insurance Co., 62 Miss. 721.

6. Walker v. Fireman's Fund Ins. Co., 114 Ore. 545, 234 Pac. 542 (1925).

7. Hessler v. North River Ins. Co. of City of New York, 211 App. Div. 595, 207 N. Y. S., 529 (1925).

8. Stanilov v. Lincoln Mut. Cas. Co. (Ill App.), 19 Ill. Law Rev. 18.

automobile is purchased on the payment plan and there has been a transfer of the purchase contract.[9] The agent can bind himself by parole to procure insurance, and if there is a breach of contract, he is liable in damages.[10]

§ 60. Soliciting agent.

An insurance solicitor is agent of the company and not of the insured, and the company cannot avoid such rule by inserting in its policy that he acts as agent for the insured.[11] This rule applies to mutual as well as stock companies. Limited authority of an insurance agent to solicit business only does not make him a general agent for all purposes.[12] Payment of a premium due on an automobile fire insurance policy to a soliciting agent is payment to company under statute of state of Washington defining an "insurance solicitor."[13] But the insured is responsible for misrepresentations in an application for automobile insurance when it is drawn by a regular soliciting agent of the insurance company, where such an agent has no authority to waive the provision usually contained in the policy that the policy is avoided if any misrepresentation is made concerning material fact.[14] But, generally speaking, the insured is not bound by mistake or carelessness of soliciting agent in furnishing information concerning the insurance on automobiles. For example, it has been so held in a Missouri case, where an automobile insurance policy was solicited by a salesman who solicited insurance for the company's local agents on a commission basis, and the insured made no representations, but the soliciting agent saw the automobile and furnished to the company's local agents information for drawing up the policy, and on such information the policy described the car as a new one, when in fact it was

9. Platzer v. Cutting Larson Co., 190 N. Y. S. 769 (1921).
10. Cass v. Lord, 236 Mass. 430, 128 N. E. 716 (1925).
11. Standard Auto Ins. Ass'n v. Russell, 199 Ky. 470, 251 S. W. 628 (1923).
12. Ames v. Auto Owners Ins. Co., 225 Mich. 44, 195 N. W. 686 (1923).
13. Snavely v. London Assur. Corp., 128 Wash. 47, 221 Pac. 611 (1924).
14. Solomon v. Federal Ins. Co., 176 Cal. 133, 167 Pac. 859 (1917).

not, and the policy provided that it should be void if the locking device known as the "defender lock" was not maintained and used on the automobile, when in fact, the car was one on which it was impossible to install a "defender lock."[15] But, even though the company is chargeable with knowledge of facts known to solicitor at time of securing application for insurance, the insurer cannot be bound by any statements that the solicitor may make to the insured after forwarding application. Thus it was held in a Michigan case that where parties requested soliciting agent to transfer automobile collision policy when insured purchased truck and agent said he would, there was no waiver of insurer's rights to have provision regarding transfer complied with, when the conversation took place after the application was forwarded to the insurer. For the insurer is only chargeable with knowledge of such facts as were known to the solicitor at the time of securing the application for automobile collision insurance.[16] But in a Kentucky case, the court said: "Our rule regards an insurance solicitor as the agent of the company and not of the insured; and if such agent writes false answers to questions propounded to the applicant, or by misleading statements induces the applicant to make false answers, when the applicant is acting in good faith and without any intention to deceive, the company will be estopped to rely upon the answers to defeat the policy."[17]

§ 61. Local agent with limited authority.

Local agents may have general or limited powers. Where the local agent solicits the business, countersigns the policies, delivers them to the assured, collects the premiums, and has charge of renewals, he has general authority. But where the local agent is employed to do particular things,

15. Carroll v. Union Marine Ins. Co., Ltd., of Liverpool (Mo. App.), 249 S. W. 691 (1923).

16. Comp. Laws Supp. 1922, pars. 9100 (87), 9100 (311), et seq.; Serbinoff v. Wolverine Mut. Motor Ins. Co., 242 Mich. 394, 218 N. W. 776.

17. Standard Auto Ins. Co. v. Russell, 199 Ky. 470, 251 S. W. 628 (1923).

such as solicit the business or collect premiums, he is an agent of limited authority. Thus, it has been held in a California case, where a local agent was appointed for the transaction of automobile business in a certain place by a letter which recited that "policies will be written at this office," he had no authority to make a binding contract of insurance for his principal.[18]

§ 62. Dealer as agent.

Automobile sales corporation arranged with an insurance company which was not licensed to do business in the state, for fire and theft insurance on cars sold within the state, said insurance to become effective on sale by retail dealer, the price to be the same whether insurance was desired or not and was to run for a period of one year from date of such sale in favor of beneficiaries. It was held that the contract was an agreement for future insurance and the retail dealer sold insurance as well as cars. The retail dealers were agents of insurer and statute requiring agent to hold certificate of authority applied.[19]

Generally speaking, an automobile dealer cannot bind insurer in statements he may make in procuring insurance for purchaser of car, unless subsequently ratified by the insurer.[20]

§ 63. Dealer as agent. Dealer, acting without scope of his employment, is not the agent of finance company.

Dealer arranged with finance company to take buyer's promissory note for part of the purchase price of an automobile. The finance company obtained insurance for itself and the buyer. The dealer, it appeared, told the purchaser that the policy obtained by the finance company would protect subsequent purchasers. But there was no agree-

18. Browne v. Commercial Union Assurance Co., 30 Cal. App. 547, 158 Pac. 765 (1916).

19. Chrysler Sales Corp. v. Smith, Ins. Com'rs (U. S. D. C.), 9 Fed. (2nd) 666, aff'd 272 U. S. 295, 47 Sup. Ct. 88 (1926).

20. Royal Indemnity Co. v. May & Ball, 222 Ky. 157, 300 S. W. 347.

ment that payments from subsequent purchaser were to be applied on the insurance. It was held that the dealer's advice in the matter was beyond the scope of his employment, and the finance company was under no obligation to obtain transfer of policy to subsequent purchaser.[21]

§ 64. Agent may act for insured.

In a California case, the plaintiff contended that the misstatements as to purchase price and year of manufacture appearing in the application were not made by him, but by agents of the insurance company. But the court concluded that the agents who made out the policy were not the regular agents of the insurance company, and never had represented the insurance company, before or since; that the particular transaction was the only one in which these particular agents and the insurance company had had any dealings. In concluding, the court said: "It is well settled that, where, in circumstances such as are presented here, an insurance agent requests insurance from a company which he does not represent, he is acting for the insured, who is responsible for misrepresentations in the application made out by the broker." [22]

§ 65. Right of action.

Although an agent takes out insurance in his own name, his principal has a right of action on the policy.[23]

§ 66. Termination of agency.

Merely because an insurance agent secures and delivers to an assured an insurance policy does not obligate the agent to keep him insured. The agency terminates with the delivery of the policy, unless there is some further understanding or agreement.[24]

21. Rheuban v. Commercial Investment Trust, 81 N. H. 498, 128 Atl. 807 (1925).
22. Solomon v. Federal Ins. Co., 176 Cal. 133, 167 Pac. 859 (1917).
23. Franklin Fire Ins. Co. v. Britt (Tex. Civ. App.), 254 S. W. 215 (1923).
24. Lock v. Neel Co., 84 Pa. Super. Ct. 130 (1924).

§ 67. Jury.

If there are facts from which an agent's authority can be fairly and reasonably inferred, the case is for the jury.[25] Thus, whether the agent accepting an application for policy of automobile insurance has apparent authority to act generally for the insurer in perfecting insurance, is a question for the jury.[26]

§ 68. Statute.

A sub-agent appointed by general agent of an automobile insurance company to solicit insurance is a "local agent" within Arizona statute providing for service upon local agent of a corporation.[27]

§ 69. Adjuster.

AN ADJUSTER, IT IS GENERALLY HELD, HAS AUTHORITY TO COMPROMISE AND SETTLE CLAIMS, AND THE COMPANY IS BOUND BY HIS ACTS THAT ARE WITHIN THE APPARENT SCOPE OF HIS AUTHORITY.

An adjuster for an insurance company generally has authority to ascertain the loss and agree with the insured on a settlement. He has authority to compromise and settle claims. The company will be bound by the acts of an adjuster acting within the apparent scope of his authority.[28]

25. Douglas v. Insurance Company of North America, 215 Mich. 529, 184 N. W. 539 (1921).

26. Ames v. Automobile Owners Insurance Co., 225 Mich. 44, 195 N. W. 686 (1923).

27. Arizona Mut. Auto. Ins. Co. v. Bisbee Auto Co., 22 Ariz. 376, 197 Pac. 980.

28. Champion Auto. Co. v. Commonwealth Ins. Co., 31 Del. 581, 117 Atl. 126 (1922); Commonwealth Ins. Co. v. Solomon, 32 Del. 98, 119 Atl. 850 aff'g 31 Del. 581, 117 Atl. 126 (1923); Lozier Automobile Exch. v. Interstate Casualty Co., 197 Iowa 1130, 198 N. W. 501 (1923); Hart v. Springfield Fire & Marine Ins. Co., 136 La. 114, 66 So. 558 (1914); Gormley v. Westchester Fire Ins. Co., 256 Mass. 221, 152 N. E. 320 (1926); Councill v. Sun Ins. Office of London, 146 Md. 137, 126 Atl. 229 (1924), 51 A. L. R. 29; Chisholm v. Royal Ins. Co., Ltd., 225 Mass. 428, 114 N. E. 715 (1917); Douglas v. Insurance Co. of North America, 215 Mich. 529, 184 N. W. 539 (1921).

§ 70. Authority limited by policy.

In a Massachusetts case, on an automobile collision policy which provided that no officer, agent, or representative of the insurance company should have power to waive any of the terms of the policy unless such waiver was written upon the policy or attached thereto, and that no person should be deemed an agent of the company unless specifically authorized in writing by the company, where an adjuster made an agreement with the assured to pay a certain amount in compromise of the claim, but was not affirmed in writing by the company, it was held there was no liability.[29]

§ 71. Illustrations. (a) Apparent authority.

In the absence of evidence of the actual authority of the adjuster, it is to be assumed that he had power to bind the company in the ascertainment of what the damage was, and in adjusting the cost of repairing it.[30]

An adjuster has apparent authority to determine the extent of the loss under a theft policy and can make an adjustment of the cost of repairing, but he has no authority to agree to place the car in as good condition as new.[31]

§ 72. Illustrations. (b) Special instructions.

Adjuster was held not liable for false assumption of authority to adjust damage to automobile, where his special instructions did not limit his general authority.[32]

§ 73. Illustrations. (c) Ratification.

An insurer of an automobile by submitting to the owner an adjustment based on a contract for its repair, a bill for which it paid, recognizes the one who made the contract as its agent, authorized to adjust the claim.[33]

29. Gormley v. Westchester Fire Ins. Co., 256 Mass. 221, 152 N. E. 320 (1926).

30. Shapiro v. Security Ins. Co., 256 Mass. 358, 152 N. E. 370 (1926).

31. Chisholm v. Royal Ins. Co., 225 Mass. 428, 114 N. E. 715 (1917).

32. Lewis v. Chapin, (Mass.) 160 N. E. 786; Same v. Preferred Accident Ins. Co. of New York, 160 N. E. 786 (1928).

33. Councill Sun Ins. Office of London, 146 Md. 137, 126 Atl. 229, 51 A. L. R. 29 (1924).

§ 74. Illustrations. (d) Evidence.

Evidence of an employee of insurance company agent that he paid a discount corporation for a lien on the insured automobile, named sum under the policy in suit, was competent as circumstance on authority of the agent to adjust losses.[34]

(B) BROKERAGE.

BROKER DEFINED. AN INSURANCE BROKER IS ANY PERSON WHO, FOR A CONSIDERATION, ACTS OR AIDS IN NEGOTIATING CONTRACTS OF INSURANCE FOR OTHERS.

BROKER AS AGENT OF ASSURED. THE BROKER IS USUALLY THE AGENT OF THE ASSURED, BUT SPECIAL CIRCUMSTANCES WILL DETERMINE THE RELATIONSHIP.

EXCEPTION. WHERE POLICY OF INSURANCE IS DELIVERED TO BROKER AND INSURER AUTHORIZES HIM TO COLLECT PREMIUM, BROKER IS FOR PURPOSE OF COLLECTING PREMIUM, THE AGENT OF THE INSURER, AND PAYMENT TO THE BROKER IS BINDING ON THE INSURER EVEN THOUGH HE FAILS TO ACCOUNT TO THE INSURER.

§ 75. Broker defined.

As defined by section 143 of the Insurance Laws of the state of New York, "the term 'broker' * * * shall include any person, partnership, association or corporation who, for money, commission or anything of value, acts or aids in any manner on behalf of the insured in negotiating contracts of insurance or placing risks or taking out insurances, * * *."

An insurance broker has been defined in the state of Washington as any person not an appointed agent for the company who acts or aids in negotiating insurance for others.[35]

§ 76. In general.

A broker is generally the agent of the insured, although it should be determined from the facts in each case whether

34. National Fire Ins. Co. v. Gellman, 83 Ind. App. 219, 144 N. E. 154 (1924).

35. Washington Statutes, Rem. Code, 1915, secs. 6059-2 cited in Day v. St. Paul Fire & Marine Ins. Co., 111 Wash. 49, 189 Pac. 95 (1920).

an insurance broker represents the insured or the insurance company.[36] The fact that an independent agent or insurance broker retains a commission on a policy does not constitute him the agent of the insurer.[37] An insurance broker who solicits an application for automobile fire and theft insurance and secures from the insurer's agent the policy is not thereby constituted the agent of the insurer.[38] An insurance agency, to whom application is made orally, when not accredited legal agent of insurer, is deemed agent of the insured.[39] Where an insurance agent requests insurance from a company which he does not represent, he is acting for the insured, who is responsible for misrepresentations in the application made out by the broker.[40] So, in Missouri case it was held that where a broker acted as the agent of insured in obtaining a fire insurance policy on insured's automobile, misrepresentations by the broker in procuring the policy were binding on the insured. Representations that the automobile was not mortgaged, when in fact it was mortgaged for its full value, were material to the risk and avoided the policy as a matter of law.[41] Under Washington

36. Kenney v. Franklin Fire Ins. Co. of Philadelphia (Mo. App.), 247 S. W. 249; Smith v. American Automobile Ins. Co., 188 Mo. App. 297, 175 S. W. 115; Buck v. Stuyvesant Ins. Co. of New York, 209 Mo. App. 302, 237 S. W. 840; Carroll v. Union Marine Ins. Co., Ltd., of Liverpool (Mo. App.), 249 S. W. 691; Farber v. American Automobile Ins. Co., 191 Mo. App. 307, 177 S. W. 675; Abrahamson v. Hartford Fire Ins. Co., 181 Ill. App. 254; Day v. St. Paul Fire & Marine Ins. Co., 111 Wash. 49, 189 Pac. 95; Mishiloff v. American Central Ins. Co., 102 Conn. 370, 128 Atl. 33; Rosedale Securities Co. v. Home Ins. Co. of New York, 120 Kan. 415, 243 Pac. 1023; Overland Sales Co. v. American Indemnity Co. (Tex. Civ. App.), 256 S. W. 980; Boston Store v. Hartford Acc. & Indemnity Co., 227 Ill. App. 192; Solomon v. Federal Insurance Co., 176 Cal. 133, 167 Pac. 859 (1917); Bennett v. Northwestern Nat. Ins. Co., 53 Cal. App. 800, 257 Pac. 586 (1927); Cranston v. California Insurance Co., 94 Or. 369, 185 Pac. 292 (1919); Sheridan v. Massachusetts Fire & Marine Ins. Co., 233 Mass. 479, 124 N. E. 249 (1918).

37. Solomon v. Federal Insurance Co., 176 Cal. 133, 167 Pac. 859 (1917).

38. Sheridan v. Mass. F. & M. Ins. Co., 233 Mass. 479, 124 N. E. 249 (1918).

39. Lindstrom v. Employers' Indemnity Corp., 146 Wash. 481, 263 Pac. 953.

40. Solomon v. Federal Ins. Co., 176 Cal. 133, 167 Pac. 859.

41. Buck v. Stuyvesant Ins. Co. of City of New York, 209 Mo. App. 302, 237 S. W. 840.

statute, it has been held that one not an appointed agent of the company, who acted for plaintiff in procuring insurance, was a broker, though he had no license, or if not a broker, nevertheless was insured's agent where the insurer did not know he did not have a license.[42] But statements made by broker to the insurance company, in effecting fire and theft insurance on an automobile are not binding upon the insured where the insured applies directly to the company for the insurance and the company refers the application to the broker to ascertain the facts.[43]

It has been held in a Texas case that where the firm to whom insured applied for liability insurance never had any authority to solicit or write insurance for the defendant company and did not undertake to more than apply to the company's general agent for the policy, which was countersigned only by the general agent, coupled with provision in the policy that no person should be deemed an agent of the company unless authorized in writing, and the insured recognized the firm as his agent in reporting on accident, that under such circumstances, they were the agents of the insured and at most sustained only the relation of broker.[44] It was contended in this case that the company had ratified the acts of the firm as its agents in receiving reports of an accident, but the court held that evidence so received by the company was more than 14 months after its occurrence.[45]

Statements made by an insurance broker to an automobile owner after the expiration of a policy of fire and theft insurance on the car, that the owner would be held covered with insurance, are not admissible in evidence on the trial of a case to establish agency, and such statements are not binding on the insurer.[46] And the fact that the insurer sent

42. Day v. St. Paul F. & M. Ins. Co., 111 Wash. 49, 189 Pac. 95 (1920).

43. Kenney v. Franklin Fire Ins. Co. (Mo. App.), 247 S. W. 249 (1923).

44. Overland Sales Co. v. American Ind. Co. (Tex. Civ. App.), 256 S. W. 980 (1921).

45. Overland Sales Co. v. American Ind. Co. (Tex. Civ. App.), 256 S. W. 980 (1921).

46. Sheridan v. Mass. F. & M. Ins. Co., 233 Mass. 479, 124 N. E. 249 (1918).

notice of expiration of a fire and theft policy on an automobile to an insurance broker, who had secured the application for the policy by the insurer's agent, was not sufficient evidence in itself from which it could be held that the insurer had given the broker authority to bind it by an oral contract of insurance, or by an agreement to issue a policy.[47]

§ 77. Illustrations. (a) Binder.

The liability of the insured for the conduct of a broker is well illustrated in an Oregon case. The plaintiffs, who were automobile dealers, telephoned the broker that they had several cars to insure. An employee of the broker's office went to the dealer's place of business, secured information concerning the cars and number to be insured, and thereafter wrote a letter to the plaintiffs advising that pending receipt of covering notes "this will serve to protect you against loss or damage resulting from fire or theft on" the automobiles to be insured, "said coverings to be in the California Fire Insurance Company." Prior to this time, the brokers never had had any business dealings with the California Fire Insurance Company, had not acted as its agents, and did not so represent to the plaintiffs. Under such circumstances, the court held that the brokers were representing the plaintiffs, and that the insurance company could not be bound by the representations made by the brokers to the plaintiffs in the letter.[48]

§ 78. Illustrations. (b) Application made to broker.

In a Missouri case, application was made to one who only wrote life and accident insurance, who, in turn, placed the business in the hands of a broker, and this broker obtained the insurance through several agents who divided the commission. The court held that the insurer was not responsible for the failure of the person to whom the application

47. Sheridan v. Mass. F. & M. Ins. Co., 233 Mass. 479, 124 N. E. 249 (1918).
48. Cranston v. California Ins. Co., 94 Or. 369, 185 Pac. 292 (1919).

was made to ascertain the year model of the car, as such person was a mere broker and representing the insured.[49]

§ 79. Illustrations. (c) Assured liable for conduct of broker.

An automobile covered by a theft policy, as required by a rider, provided that in consideration of a reduction in premium, the insured automobile would be continuously equipped with a Buick transmission locking device. The insured, who procured the insurance through a broker, did not know of the existence of the provision in the policy requiring that the car be equipped with a locking device. It was contended by the insured that the broker was the agent of the insurer, and, as the insured had not designated any particular kind of policy, and not having knowledge of the particular provision of the policy in question, he was not liable for breach of warranty. However, the court held that the insurer's defense that the broker was the agent of the insured was tenable.[50]

§ 80. Oral agreement.

An insurance broker, unless he has express or implied authority to act for an insurer, has no authority to bind the insurer by oral agreement.[51] Thus a policy cannot be renewed by a broker by oral agreement without the express or implied consent of the insurer.[52]

§ 81. Broker as agent of insurer.

The broker, generally speaking, and as defined by statute, is not the agent of the insurer, but is the agent of the assured. However, special circumsances in each case will deter-

49. Smith v. American Auto. Ins. Co., 188 Mo. App. 297, 175 S. W. 113 (1915).

50. Rosedale Securities Co. v. Home Insurance Co., 120 Kan. 415, 243 Pac. 1023 (1926).

51. Sheridan v. Massachusetts F. & M. Ins. Co., 233 Mass. 479, 124 N. E. 249 (1919).

52. Sheridan v. Massachusetts F. & M. Ins. Co., 233 Mass. 279, 124 N. E. 249 (1919).

mine the relationship.[53] For example, in a Missouri case, the broker who solicited the automobile insurance was a friend of the person from whom the insured had purchased the car. He represented himself to the insured as an insurance agent, and had a special agent's card. On the policy of fire insurance, the broker's name appeared as a special agent of the insurance company. It was held that the insurance broker was agent of the insurer, and that representations made in the insurance policy by him as to the value of the car estopped the insurer from asserting the contrary.[54]

§ 82. Broker as agent of insurer for collection of premium.

Where the policy is delivered by the insurer to the broker with the expectation that the insurer will receive the premium directly from the broker, such a line of conduct on the part of the insurer constitutes the broker the agent of the company, at least for the purpose of collecting the premium; and if under such circumstances the premium is paid by the assured to the broker, it will legally be considered payment to the company. It is generally held that the assured, upon making payment to the broker, under such circumstances, will be discharged from further liability to the company for the premium; and the company will not be permitted to cancel the policy on the ground that the premium has not been paid.[55]

§ 83. Jury.

Whether the broker is the agent of the insured or the insurer may be a question of fact for determination by the jury.[56]

53. Buck v. Stuyvesant Ins. Co. of New York, 209 Mo. App. 302, 237 S. W. 840 (1922); Farber v. American Automobile Ins. Co., 191 Mo. App. 307, 177 S. W. 675 (1915).

54. Farber v. American Auto. Ins. Co., 191 Mo. App. 307, 177 S. W. 675 (1915).

55. See Sunderlin on Fire Insurance, Lecture No. 13 on "Premiums", p. 16, citing many cases in support of the rule.

56. Buck v. Stuyvesant Ins. Co. of New York, 209 Mo. App. 302, 237 S. W. 840 (1922); Overland Sales Co. v. American Indemnity Co. (Tex. Civ. App.), 256 S. W. 980 (1923).

CHAPTER V.

WAIVER AND ESTOPPEL.

SECTION.

84. Waiver and estoppel distinguished.
85. Federal rule.
86. Application.
87. Authority of agents.
88. Forfeitures.
89. Knowledge.
90. Same—Imputed.
91. Notice (a) In general.
92. (b) Intention to take out additional insurance.
93. (c) Information secured by general agent.
94. Soliciting agent has no authority to waive misrepresentation.
95. Exception—Soliciting agent with general powers.
96. Statutory policy.
97. Parol promise.
98. Gratuitous payment.
99. Unconditional ownership.
100. Same.
101. Transfer of title.
102. Chattel mortgage.
103. Evidence.
104. Jury.
105. Ratification—In general.
106. Cancellation.
107. Failure to cancel.

§ 84. Waiver and estoppel distinguished.

The terms "waiver" and "estoppel," though often used interchangeably with reference to insurance contracts, are really distinguishable; waiver being an intentional abandonment or relinquishment of a known right, and estoppel being preclusion by conduct from asserting rights which might otherwise have existed. A waiver may be express or implied; but it is asserted, as applied to the law of insurance, that the doctrine of implied waiver is only another name for the doctrine of estoppel, and must rest on misleading conduct. The doctrine of waiver and estoppel has been generally applied by the state courts in the law of insurance because they do not favor forfeitures.

§ 85. Federal rule.

The federal rule is that the provision of the policy that no agent of the insurer shall have power to waive any provision of the policy unless such waiver is in writing and attached to the policy is valid and binding and excludes proof of waiver or agent's custom.[1]

§ 86. Application.

False statement written in application by the agent of the company that the automobile insured was not mortgaged, where the insured either actually knew of the falsity of the statement or the means of knowledge by reading the policy, does not relieve the insured from the warranty of the policy against encumbrance, and the company is not estopped to plead the breach of warranty as to encumbrance as defense.[2] Even though the agent of the insurance company who takes the application for an automobile fire insurance policy has a mortgage on the insured car, in such a case, notice to the agent is not notice to the company, and does not constitute waiver of the warranty against encumbrance.[3] But it has been held in a New York case that where insured made application for policy by filling out and mailing to company blank form requesting necessary information, he had right to rely on company's not inserting in the policy representations which he had not made and where the company did insert such an unauthorized representation, it was estopped from setting up misrepresentation as a defense to action on the policy.[4]

§ 87. Authority of agents.

The provision of the policy that no clause shall be waived

1. Christian & Brough Co. v. St. Paul Fire & Marine Ins. Co. (U. S. C. C. A. 5th Circuit), 5 Fed. (2nd) 495 (1925).

2. Eagle, Star & British Dominions Ins. Co., Ltd. v. Main, 140 Md. 220, 117 Atl. 571 (1922).

3. Spivy-Johnson Portrait Co. v. Belt Auto. Ind. Ass'n, 210 Ala. 681, 99 So. 80 (1924).

4. Davern v. American Mut. Liability Ins. Co., 241 N. Y. 318 (1925), 150 N. E. 129, aff'g 214 App. Div. 754, 209 N. Y. S. 818.

except by writing indorsed thereon does not preclude the insurer from thereafter authorizing a waiver in some way.[5] But it is held in a Georgia case that limitations in insurance policies upon the authority of agents of the company to waive the conditions of the policy are to be treated as referring to waivers made subsequently to the issuance of the policy.[6] The New York courts have consistently upheld the right of the insurers to limit the authority of an agent to waive forfeitures or conditions subsequent to the inception of the contract.[7]

§ 88. Forfeitures.

Restrictive provisions are inserted in insurance contracts for the benefit of the insurer. Forfeitures are not favored in law, and the party for whose benefit they are inserted may always decline to insist upon them. If insurers are advised of circumstances which operate as a forfeiture of the policy, it is the duty of the insurer to notify the insured of such forfeiture, and either suspend the forfeiture provision, or, if insured fails to request such suspension, at least to cancel the policy altogether. Insurer cannot with good grace, under such circumstances, remain silent, treating the policy as valid and binding and afterwards assert its invalidity; for, if the insurer has knowledge of a breach of a condition in the policy, but treats it as still operative and valid by failing to assert the right to forfeit and cancel

5. Shapiro v. Security Ins. Co., 256 Mass. 358, 152 N. E. 370 (1926); Hessler v. North River Ins. Co. of City of New York, 211 App. Div. 595, 207 N. Y. S. 529 (1925); Armstrong v. Agricultural Ins. Co. of Watertown, N. Y., 130 N. Y. 560, 29 N. E. 991; Titus v. Glens Falls Ins. Co., 81 N. Y. 410; Roby v. American Central Ins. Co. of St. Louis, 120 N. Y. 510, 24 N. E. 808; Myers v. Maryland Casualty Co., 123 Mo. App. 682, 101 S. W. 124; Doerr v. National Fire Ins. Co., of Hartford, 315 Mo. 266, 285 S. W. 961 (1926), rev. 253 S. W. 39; Midland Motor Co. v. Norwich Union Fire Ins. Soc., 72 Mont. 583, 234 Pac. 482 (1925); Devenny v. Automobile Owners' Interinsurance Ass'n, 124 Wash. 453, 214 Pac. 833 (1923).

6. Grantham v. Royal Insurance Co., 34 Ga. App. 415, 130 S. E. 589 (1925).

7. Walsh v. Hartford Fire Ins. Co., 73 N. Y. 5; Quinlan v. Providence Washington Ins. Co., 133 N. Y. 356, 28 Am. St. Rep. 645, 31 N. E. 31; Greentaner v. Connecticut Fire Ins. Co., 228 N. Y. 388, 127 N. E. 249, 14 A. L. R. 841.

the same, the policy will continue in full force and effect.

The rule is now established that if in any negotiation or transaction with the assured after knowledge of the forfeiture, it recognizes the continued validity of the policy, or does acts based thereon, or requires the insured to do some act or incur some trouble or expense, the forfeiture is waived.[8]

As stated in a leading case: "A waiver of the forfeiture may result from the conduct of the insurer and it may be stated as a rule, that, where the insurer with knowledge that a cause of forfeiture exists so conducts himself towards the insured that the latter is justified in believing the right of forfeiture will not be invoked, and is led thereby into the expenditure of time or money in presenting his demand to the insurer, a waiver will be presumed. The insured has the right to rely on the implied assurance contained in such conduct and, after he has acted on it, the insurer will not be permitted to hark back and deny liability on the ground that his prior actions show he had voluntarily abandoned the claim."[9]

§ 89. Knowledge.

Waiver consists in the relinquishment of a known right. So a party cannot be deemed to have waived a right based upon material facts, the existence of which he did not know.[10] But where insurer has knowledge of facts which would invalidate the contract from its inception, when it issues the policy, conditions inconsistent with such facts are waived and it is estopped from setting up breach of

8. Armstrong v. Agricultural Ins. Co. of Watertown, N. Y., 130 N. Y. 560, 29 N. E. 991; Titus v. Glens Falls Ins. Co., 81 N. Y. 410; Roby v. American Central Ins. Co. of St. Louis, 120 N. Y. 510, 24 N. E. 808; Hessler v. North River Ins. Co. of City of New York, 211 App. Div. 595, 207 N. Y. S. 529 (1925).

9. Myers v. Maryland Casualty Co., 123 Mo. App. 682, 101 S. W. 124, quoted in Doerr v. National Fire Insurance Co. of Hartford, 315 Mo. 266, 285 S. W. 961 (1926), rev. (Mo. App.) 253 S. W. 39.

10. Michigan Auto. Ins. Co. v. Van Buskirk, 115 Ohio St. 598, 155 N. E. 186 (1926).

such conditions as a defense.[11] Where in an action on an automobile insurance policy, indemnifying against theft of an automobile, the facts revealed that the insurance company solicited the insurance of the car and placed its own value upon it after an inspection at a time when insured was not present, such insurance company cannot be heard to complain concerning such value.[12] Where the agent of the insurance company has true knowledge as to the title of the insured to the automobile, and is so informed by the insured, but the agent misstates those facts in the policy, the insured is not at fault, and he has right of recovery on the policy.[13] But it has been held in a Washington case that where the insured accepts policy in which the answers in the application are embodied as warranties, which he knew were untrue, he cannot escape responsibility for the untrue warranties by asserting that the answers were written in by the insurance company's agent without his knowledge and that he did not read the policy and hence did not actually intend to deceive the company.[14] However, information obtained by the company's agent is binding on the insurer. It could not assert that the statement in application that the automobile was worth $2,000 was made with intent to deceive where the agent was informed by the insured that he traded for the automobile.[15] Where insured informes company's agent that mortgage on automobile has been discharged but not released, it is immaterial whether mortgage is valid because actually given for sufficient consideration, for, if in fact a valid mortgage existed at the time of issuance of the policy, the insurer waived the

11. Midland Motor Co. v. Norwich Union Fire Ins. Soc., 72 Mont. 583, 234 Pac. 482 (1925).

12. Corporation of Royal Exchange Assurance of London v. Puckett (Tex. Civ. App.), 246 S. W. 705 (1923).

13. Hessler v. North River Ins. Co. of City of New York, 211 App. Div. 595, 207 N. Y. S. 529 (1925).

14. Hayes v. Automobile Ins. Exch., 126 Wash. 487, 218 Pac. 252 (1923), 129 Wash. 202, 224 Pac. 594 (1924).

15. Devenny v. Automobile Owners' Interinsurance Ass'n of Washington, 124 Wash. 453, 214 Pac. 833 (1923).

matter of its existence and is estopped.[16] So, insurer is estopped from setting up misrepresentation in application as to model of automobile as a defense where its agent is told the true facts at the time of writing the policy.[17] Where an insurance company appointed a person as agent and he goes out clothed with the indicia of authority to make contracts of insurance, and he induces the public to believe he is vested with all power and authority necessary for him to do the act, the company will not be heard to defend a suit by one he has insured, by pleading that he acted beyond the scope of his authority unless it be made to appear the assured knew the precise extent of the authority conferred on the agent.[18] Whether an agent has express authority to do a certain act is a question of fact for the jury, but whether an implied authority arises from a certain state of facts is a question of law which should not be submitted to the jury.[19] But in an action on a policy of insurance covering an automobile which was mortgaged and used in public service contrary to the terms of the policy, knowledge of such mortgage and of such use by the agents of the company was a question for the jury.[20]

§ 90. Knowledge. Imputed.

Knowledge of agent of insurance company concerning subject of insurance which is acquired while procuring the application may be imputed to the company.[21] Thus, where a company's agent at the time the policy was applied for,

16. Third National Bank v. Yorkshire Ins. Co., 218 Mo. App. 660, 267 S. W. 445 (1924).

17. Midland Motor Co. v. Norwich Union Fire Ins. Soc., 72 Mont. 583, 234 Pac. 482 (1925).

18. Phillips v. Continental Auto. Ins. Ass'n (Ill. App.), 17 Ill. Law Rev. 202.

19. Phillips v. Continental Auto. Ins. Ass'n (Ill. App.), 17 Ill. Law Rev. 202.

20. Graham v. Standard Fire Ins. Co., 119 S. C. 218, 112 S. E. 88 (1922).

21. Midland Motor Co. v. Norwich Union Fire Ins. Soc., 72 Mont. 583, 234 Pac. 482 (1925); Simon v. Mechanics' Ins. Co. of Philadelphia, 31 Ga. App. 137, 121 S. E. 342 (1924); National Mut. Ins. Co. of Celina, Ohio v. Bales, 81 Ind. App. 302, 139 N. E. 703 (1924); American Central Ins. Co. v. Buchanan-Vaughan Auto. Co. (Tex. Civ. App.), 256 S. W. 610 (1923).

knew that the insured automobile stood in the names of two persons, the policy requirement as to unconditional and sole ownership was waived.[22]

§ 91. Notice. (a) In general.

The law is well settled that notice to the agent at the time of the application for insurance of facts material to the risk, is notice to the insurer, and will prevent the insurer from insisting upon a forfeiture for cause within the knowledge of the agent.[23]

§ 92. Notice. (b) Intention to take out additional insurance.

Mere notice to an agent of an insurance company of insured's intention to take out additional insurance in the future and not notice of the insurance as an accomplished fact does not establish waiver by the insurer of the provision against additional insurance. But in a Missouri case involving an automobile fire policy, where the insured telephoned to the company's agent that she was taking additional insurance and inquired of him the name of the company holding the issued policy, who remarked in giving her the information that the policy had a long time to run, the evidence was held to be sufficient for the jury to determine whether there was a waiver under the facts by the insurer of the policy provision against additional insurance.[24]

§ 93. Notice. (c) Information secured by general agent.

Where the general agent of the insurance company on his own initiative and responsibility secured such information as he had, advised the insured that he had such information as was desired, and erroneously stated in the policy the date of purchase, price paid and place where the car

22. National Mutual Ins. Co. of Celina, Ohio v. Bales, 81 Ind. App. 302, 139 N. E. 703 (1924); Automobile Ins. Exchange v. Wilson, 144 Md. 249, 124 Atl. 876 (1923).

23. Johnson v. Royal Motor Car Ins. Ass'n, 226 Ill. App. 147 (1922).

24. Boyle v. United States Fire Ins. Co. (Mo. App)., 250 S. W. 641 (1923).

was usually kept, the company was estopped from relying upon such representations as a fire insurance policy.[25] The court said: "This case must be distinguished from those in which the agent has neither said nor done anything to mislead the assured. Here we have the agent expressly giving the assurance that he already knew every fact necessary to write valid insurance, and declining to make any further inquiry. We find him delivering a policy purporting to indemnify the assured, and receiving the premium, which was paid in good faith for such indemnity. If the contention of the company is sustained, this policy, affirmatively purporting to guarantee indemnity, and so in good faith received and paid for, was void at its inception and was a mere pretense, proclaimed a contract, but which nevertheless destroyed itself before it became effective. So to construe it would be to hold that its paltering terms merely 'Keep the word of promise to our ear, and break it to our hope.'"[26]

§ 94. Soliciting agent has no authority to waive misrepresentation.

Concerning the responsibility of the insurance company where misrepresentations of material facts are contained in an application for insurance which is drawn by a soliciting agent for the company, the California supreme court says: "The law in this state * * * holds the insured responsible for misrepresentations in the application when it is drawn by a regular soliciting agent of the insurance company, where, * * * such an agent has no authority to waive the provision contained therein that the policy is to be avoided if any misrepresentation has been made concerning a material fact.[27]

25. North River Ins. Co. of New York, v. Lewis, 137 Va. 322, 119 S. E. 43 (1923).

26. North River Ins. Co. of New York v. Lewis, 137 Va. 322, 119 S. E. 43 (1923).

27. Solomon v. Federal Ins. Co., 176 Cal. 133, 167 Pac. 859 (1917).

§ 95. Exception. Soliciting agent with general powers.

It has been held by an Oklahoma court that where an applicant for automobile (theft) insurance advised the soliciting agent of the company as to the true status of the legal title to the automobile to be covered by insurance, and of the interest of the applicant therein, and the agent, acting within the scope of his authority, accepted the premium from the applicant and agreed to execute and deliver the policy, the knowledge acquired by such agent as to the title to the automobile is imputed to the insurance company issuing the policy. Thus, where the soliciting agent of an insurance company, with full knowledge of the status of the title to the automobile, and while acting in the usual course of his duties as such agent, executes the policy in the name of a third person having only an equitable interest in the automobile, as a conditional vendee, the insurance company is estopped to defend the action on the ground that the legal title to the car was in the name of a third person.[28]

§ 96. Statutory policy.

An insurance agent may waive conditions of dealer's open automobile fire and theft insurance policy, even though such policy is statutory.[29]

§ 97. Parol promise.

Where a condition in a liability insurance policy expressly provided that no provision of the policy shall be "waived or altered except by endorsement hereon signed by the president or the secretary," a parol promise by the vice-president and general manager of the company to a policyholder to save him harmless from liability under a possible judgment, although the amount might exceed the limit of

28. American Ins. Co. v. Jueschke, 110 Okla. 250, 237 Pac. 585 (1925).

29. American Central Ins. Co. v. Buchanan-Vaughan Automobile Co. (Tex. Civ. App.), 271 S. W. 895 (1925), aff'g 256 S. W. 610 (1923).

liability in the policy, is void as in conflict with an essential condition of the policy.[30]

§ 98. Gratuitous payment.

A local agent in California was authorized to transact business with the understanding that all policies would be written and issued at the company's office. The assured desired coverage for collision insurance, but by mistake of the local agent a rider was attached to the policy providing against loss by reason of property damage to other cars. When assured's car was slightly damaged in a collision, the loss was paid, but the assured was then informed that the policy did not cover such a loss and that the company was not liable. However, the assured made no effort to change the policy to cover collision loss. Again, there was a collision loss. The insurer this time refused to pay. The court held that the company was not estopped from relying upon the coverage of the written contract.[31]

§ 99. Unconditional ownership.

Where an agent authorized to issue and deliver an insurance policy in behalf of the insurer issues and delivers it with knowledge that the insured automobile is not fully paid for, and was purchased under a contract retaining title in the seller until full payment of the purchase price, knowledge of the agent is knowledge of the company, and delivery of the policy with such knowledge amounts to a waiver of a "warranty" in the policy that the automobile is fully paid for, and of the stipulation therein that the company shall not be liable if the interest of the insured in the property be other than unconditional ownership.[32]

30. McClung v. Pennsylvania Taximeter Cab. Co. (Phila. Co. C. P.), 73 Legal Intelligencer, 439.

31. Browne v. Commercial Union Assurance Co., 30 Cal. App. 547, 158 Pac. 765 (1916).

32. Simon v. Mechanics' Ins. Co. of Philadelphia, 31 Ga. App. 137, 121 S. E. 342 (1924).

§ 100. Unconditional ownership.

Where company's agent issued and delivered policy with knowledge that car was not fully paid for and that seller retained title until purchase price was paid, his knowledge was imputed to the company and delivery of the policy amounted to waiver of warranty as to full payment and stipulation as to ownership.[33]

§ 101. Transfer of title.

Provision of automobile collision insurance policy for consent to transfer of title to property insured may be waived.[34]

§ 102. Chattel mortgage.

In an Illinois case, the insured had purchased an automobile for $1,400 and had paid $450 cash. The vendor took back a chattel mortgage for the difference. The insurer's agent had knowledge of these facts when he solicited the insurance, and the insured did not read the policy. Under the terms of the policy it was void because of the chattel mortgage, but the insurer was estopped from asserting the defense of breach of warranty because the agent had knowledge of the facts.[35]

§ 103. Evidence.

Where there is a conflict of evidence as to whether or not the insured told the agent of the insurance company before the policy was written that there was a chattel mortgage on the automobile, it is a question for the jury to determine under such circumstances whether there was a waiver of the provision of the policy against encumbrance.[36]

33. Grantham v. Royal Ins. Co., 34 Ga. App. 415, 130 S. E. 589 (1926).
34. Serbinoff v. Wolverine Motor Ins. Co., 242 Mich. 394, 218 N. W. 776.
35. Johnson v. Royal Motor Car Ins. Ass'n, 226 Ill. App. 147 (1922).
36. Jeffords v. Tokio Marine & Fire Ins. Co., 123 S. Car. 467, 117 S. E. 79 (1922).

§ 104. Jury.

Whether insurer made inquiry concerning condition of title to insured automobile on collision policy is a question for the jury.[37]

§ 105. Ratification. In general.

Failure by a principal to delay a claim founded on an agreement of his agent does not amount to an adoption of the obligation except when, from failure to dissent, the ordinary intelligent man would be justified in inferring assent, or when failure to dissent may cause the other party to proceed to his prejudice, and in either situation the principal must have full acquaintance with the facts.[38]

§ 106. Cancellation.

An invalid or defective cancellation by the insurer will not become effective by ratification, when the act of the assured relied upon is induced by his ignorance of the fact or of his rights, or by false representations of the insurer's agent. For example, where the facts were undisputed that the assured learned for the first time about a second policy after the loss occurred, but acting on the advice and suggestion of the local agent of the defendant, signed proof of loss under the second policy, it was held in an action on the first policy that as the rights and liabilities of the parties were fixed at the time, there was nothing which the assured could have done to collect his loss upon the second policy that altered the position of the defendant or furnished any ground for an estoppel.[39]

§ 107. Failure to cancel.

Where an insurer does not cancel policy within reasonable time after discovering that assured had misrepresented

37. Lindstrom v. Employers' Indemnity Corporation, 146 Wash. 484, 263 Pac. 953 (1928).

38. Auto Outing Co. v. McFrederick, 146 Md. 106, 125 Atl. 886.

39. Baker v. North River Ins. Co., 112 Kan. 530, 212 Pac. 118 (1923).

the model and condition of insured automobiles, it can not use such misrepresentation as a defense.[40]

40. Fire Ass'n of Philadelphia v. Moss (Tex. Civ. App.), 272 S. W. 555 (1925).

CHAPTER VI.

PREMIUM.

SECTION.
108. Payment.
109. Agency.
110. Return of unearned premium.
111. Waiver.
112. Pleading.
113. Evidence.

§ 108. Payment.

Legal contract of insurance may be entered into by oral agreement and delivery of coverage certificate. Thus, prepayment of premium is not necessarily a condition precedent. Where extension of credit for sixty days is given the assured and coverage note is unconditionally delivered, the contract is binding. Prepayment of premium, if required, is waived.[1]

But it has been held that presentation of policy is mere evidence of willingness to enter into contract on payment of premium.[2]

§ 109. Agency.

Where plaintiff was an insurance agent and had written fire insurance under an agreement with insurer's agent that the commission should be divided, and the premium had been collected, and theft insurance on plaintiff's car was taken out through the agent under the agreement that part of plaintiff's insurance commissions would be applied to the payment of his theft insurance premium, it was held in an action to recover for the theft of the insured car that

1. Jones v. International Indemnity Co., 39 Cal. App. 706, 179 Pac. 692 (1919).

2. Royal Insurance Co., Ltd. v. Eggleston, 19 Ala. A. Rep. 638, 99 So. 828 (1924).

plaintiff had paid the premium to insurer's agent, and he was entitled to a directed verdict.[3]

§ 110. Return of unearned premium.

The insurance company must act with reasonable promptness on discovering facts on which liability may be avoided, under the provision of the insurance policy rendering it void on certain conditions. The provision, in fact, means voidable under certain conditions. So where the insurer fails to notify the insured of its election to forfeit the policy, with knowledge of facts equivalent to voiding the policy, and fails to tender or offer to tender back the unearned premium received, the company will be deemed to have waived its right and to have elected to treat the policy as valid.[4] But where the fire policy was written for one year and it had run four months before the loss, the interest of the mortgagee was satisfied, and knowledge of breach of warranty was not known to the insurer until after the loss, the insurer was under no obligation to return the premium.[5]

Where, after the policy attached, it became void by reason of insured's breach of a warranty contained therein, insured was not entitled to a return of any part of the premium.[6]

§ 111. Waiver.

Where the insurance company retained premium for over five months after the theft occurred, and long after suit was brought, and after denial of liability, such conduct constituted a waiver of all defenses.[7] But insurer's failure

3. Malarney v. Michigan Mutual Automobile Ins. Co., 216 Mich. 649, 185 N. W. 742 (1922); See Smith v. Hartford Fire Ins. Co., 120 Kan. 53, 242 Pac. 455 (1926).

4. National Mutual Ins. Co. v. Bales, 81 Ind. App. 302, 139 N. E. 703 (1923); Automobile Ins. Exch. v. Wilson, 144 Md. 249, 124 Atl. 876.

5. Doerr v. National Fire Ins. Co. of Hartford, 315 Mo. 266, 285 S. W. 961 (1926); reversing 215 Mo. App. 372, 253 S. W. 39.

6. Elder v. Federal Insurance Co., Ltd., 213 Mass. 389, 100 N. E. 655 (1913).

7. Carroll v. Union Marine Ins. Co., Ltd. of Liverpool (1923), (Mo. App.), 249 S. W. 691.

to tender unearned premium is not a waiver of provision rendering automobile theft policy void because of subsequent mortgage.[8]

§ 112. Pleading.

Where a fire insurance company neither pleaded nor proved that it returned or offered to return premiums on the policy sued on, it could not defend on the ground that the policy was void *ab initio*.[9]

Assured who did not plead insurer's failure to tender unearned premium as waiver of provision of automobile theft policy rendering it void because of subsequent mortgage, cannot rely thereon.[10]

§ 113. Evidence.

Burden of proving payment or agreement to pay the premium is on the assured.[11]

8. Interstate Fire Ins. Co. v. Sorrells (Tex. Civ. App.), 295 S. W. 242 (1927).

9. Caldwell v. City of New York Ins. Co. (Mo. App.), 245 S. W. 602 (1923).

10. Interstate Fire Ins. Co. v. Sorrells (Tex. Civ. App.), 295 S. W. 242 (1927).

11. Royal Insurance Co. v. Eggleston, 19 Ala. App. 638, 99 So. 828 (1924).

CHAPTER VII.

REPRESENTATIONS AND WARRANTIES.

(A) IN GENERAL.

SECTION.
114. Misrepresentation.
115. Same—Fact material to risk—Definition.
116. Warranties.
117. Warranties and representations distinguished.
118. Construction.
119. Knowledge.
120. Untrue statement not made by assured.
121. Open policy covering many cars.
122. Renewal.
123. Pleading.
124. Defense.
125. Evidence.
126. Misrepresentations to adjuster—Jury.
127. Instructions.
128. Same—Fraud.
129. Motion for judgment notwithstanding verdict.
130. Statute.

(B) DESCRIPTION—COST.

131. In general.
132. Illustrations.
133. Exchange value.
134. Same—Second-hand car.
135. Accessories.
136. Cost with equipment.
137. Conduct of the agent.
138. Overvaluation must be fraudulent.
139. Cost of financing.
140. Jury.
141. Inspection of insured car by insurer.
142. Valued policies.
143. Statute.

(C) MODEL.

144. In general.
145. Misrepresentation—New car.
146. Misrepresentation defeats recovery.
147. Insurable value.
148. Material fact.
149. Question is whether higher premium rate would be charged.

SECTION.

150. Where insurer would have rejected application—Good faith not a defense.
151. Premium rate dependent upon year model.
152. Assured acts in good faith and insurer shares responsibility.
153. Correct serial number but erroneous year model.
154. Correct number and type of car.
155. Good faith.
156. Failure of assured to read statement.
157. Where insured car is erroneously described by insurer on personal information of its agent.
158. Agent who examines car presumed to know model.
159. Where solicitor makes personal examination.
160. No intention to deceive.
161. Temporary use—Vexatious refusal to pay.
162. Subsequent conversation.
163. Conduct.
164. Evidence—(a) Certificate of registration.
165. (b) Statute.
166. (c) Number and year model not identical.
167. (d) New or second-hand.
168. (e) Directed verdict held improper.
169. Jury. (a) Misdescription.
170. (b) Evidence.
171. (c) Conflict.
172. (d) Meeting of minds even though description incorrect.
173. (e) Exchange value.
174. Estoppel—Husband and wife.
175. Appeal and error.

(D) NUMBER.

176. In general.
177. Matter of description.
178. Illustrations. (a) Correct number concealed without assured's knowledge.
179. (b) Identity.
180. Evidence. (a) Identity.
181. (b) Same—Defense.
182. (c) Examination by insurer's agent.
183. (d) Mistake.
184. Jury. In general.
185. Illustrations. (a) Identity.
186. (b) Good faith.
187. Judgment.

(E) PLACE OF KEEPING.

188. In general.
189. Location material—Factor in rate making.
190. Erroneous description.
191. Fraud or mistake.

SECTION.
192. Knowledge.
193. Waiver.
194. Illustration—Private garage construed to cover addition to barn.
195. Miscellaneous—"When not in use the car shall be kept in a garage" construed.

(F) USE OF INSURED AUTOMOBILE.

196. In general.
197. Public policy.
198. Defined.
199. Misrepresentation—Intent to deceive immaterial.
200. Compensation.
201. Descriptive.
202. Promissory warranty.
203. Illustrations.
204. Temporary use suspends policy.
205. Mortgagor and mortgagee—As their interests may appear.
206. Pleading—Condition subsequent.

(G) OTHER INSURANCE.

207. In general.
208. General rule.
209. Exception.
210. Public policy.
211. Provision is reasonable.
212. Clause has no application to insurable interests not covered.
213. Illustrations. (a) Conditional sales contract—Master policy—Knowledge.
214. (b) Same—Buyer's interest voided.
215. Mortgagee.
216. Waiver.

(A) IN GENERAL.

§ 114. Misrepresentation.

Misrepresentation is the statement of something as a fact which is untrue in fact, which insured states, knowing it to be untrue, with intent to deceive insurer, or which he states positively as true without knowing it to be true and which has a tendency to mislead, such fact in either case being material to the risk.[1]

1. Miller v. Commercial Union Assur. Co., Ltd., 69 Wash. 529, 125 Pac. 782; Daniels v. Hudson River F. Ins. Co., 12 Cush. (Mass.) 416, 59 Am. D. 192; Clark v. Union Mut. F. Ins. Co., 40 N. H. 333, 77 Am. D. 721.

§ 115. Misrepresentation.—Fact material to risk.—Definition.

A "fact material to the risk" is one which, if communicated to the insured, would cause refusal to insure or, if accepted and the policy issued, would cause a higher rate.[2]

§ 116. Warranties.

Warranties are of two kinds: affirmative and promissory. The former relate to and warrant the present or past existence of particular facts, upon the exact truth of which the inception of the contract of insurance depends, and if untrue voids the policy. An affirmative warranty is in the nature of a condition precedent to validity of policy, which, if broken, precludes policy from attaching to risk which it purports to cover, regardless of materiality of facts warranted.[3] Promissory warranties, which are of an executory character, warrant that something shall be done or omitted after the policy takes effect and during its continuance, and will avoid the contract if the thing to be done or omitted be not done or omitted as warranted.[4]

§ 117. Warranties and representations distinguished.

Underlying the whole doctrine of warranties and representations is the fundamental principle that warranties are always a part of the completed contract, while representations precede, are collateral to, and are not necessarily a part of, the contract.[5]

The difference in legal effect is that a breach of warranty in any particular is fatal to a recovery upon the policy, whilst a representation to have that effect must refer to

2. Berry v. Equitable Fire & Marine Ins. Co. (Mo. App.), 263 S. W. 884 (1924), aff'd 317 Mo. 1119, 298 S. W. 63.

3. Bennett v. Northwestern Nat. Ins. Co., 53 Cal. App. 800, 257 Pac. 586; Standard Automobile Ins. Ass'n v. Neal, 199 Ky. 699, 251 S. W. 966 (1923), 35 A. L. R. 1468 (1923).

4. Miller v. Commerical Union Assur. Co., Ltd., 69 Wash. 529, 125 Pac. 782; Orient Ins. Co. v. Van Zandt-Bruce Drug Co., 50 Okla. 558, 151 Pac. 323.

5. Equitable F. Ins. Co. v. Hearne, 20 Wall. 494, 22 L. Ed. 398; Eddy St. Iron Foundry v. Hampden Stock & Mut. F. Ins. Co., 8 Fed. Cas. 300.

some fact material to the insurance, and it must be false or fraudulent.[6]

A breach of "warranty" will avoid a policy regardless of whether or not it is material while a "false representation" will void it only when such misrepresentation is made knowingly or recklessly without knowledge of its truth or falsity and when it is of a character as would tend to influence insurer in taking a risk.[7]

§ 118. Construction.

Ordinarily a misrepresentation of the insured will not affect the validity of a policy unless it is material to the risk.[8] As a general rule, a representation in an automobile insurance policy, if false and material, avoids the policy; but whether such representation is false and material is ordinarily a question of fact for the jury.[9]

But the representation, by the terms of the application and policy, if it is so provided, may become an affirmative warranty. When the parties by the terms of their contract expressly stipulate that representation shall be regarded as material, it ceases to be a representation only, and becomes a warranty.[10] A material fact stated in application will be construed as warranty as being an express stipulation of the parties.[11] Even owner's good faith in statements so made in procuring automobile insurance is immaterial, when the statement is in fact false.[12] So, where

6. Weigle v. Cascade F. & M. Ins. Co., 12 Wash. 449, 41 Pac. 54; Pelican v. Mut. Life Ins. Co., 44 Mont. 277, 119 Pac. 778; Alabama Gold Life Ins. Co. v. Johnston, 80 Ala. 467, 2 South. 125.

7. Walker v. Fireman's Fund Ins. Co., 114 Ore. 545, 234 Pac. 542.

8. Miller v. Commercial Union Assur. Co., Ltd., 69 Wash. 529, 125 Pac. 782.

9. Orient Ins. Co. v. Van Zandt-Bruce Drug Co., 50 Okla. 558, 151 Pac. 323.

10. Miller v. Commercial Union Assur. Co., Ltd., 69 Wash. 529, 125 Pac. 782.

11. Walker v. Fireman's Fund Ins. Co., 114 Ore. 545, 234 Pac. 542; Standard Automobile Ins. Ass'n v. Neal, 199 Ky. 699, 251 S. W. 966, 35 A. L. R. 1468 (1923).

12. Affleck v. Potomac Ins. Co., (R. I.), 140 Atl. 469, re-argument denied, 141 Atl. 183; Record v. Royal Ins. Co., 253 Mass. 617, 149 N. E. 546; See Bloom v. Ohio Farmers' Ins. Co., 255 Mass. 528, 152 N. E. 345.

a policy contains the provision that "in the event of any violation of any warranty hereunder this policy shall immediately become null and void," any consideration of materiality of the breach is precluded.[13] But where answers to questions put by the insurance company assume the force of warranties of their truth, any ambiguity in such answers to such questions will be construed most strongly against the insurance company.[14] However, the rule is that notwithstanding the agreement of parties a warranty may, by reason of facts and circumstances, be regarded as waived by the company, or, what amounts to the same thing, the company may be estopped to rely upon the warranty.[15] When relied upon as a defense, fraud and deceit must be established by clear and convincing evidence, because it is the policy of the law to deal with men on the basis of their honesty and with the presumption that men are dealing with one another in a spirit of fairness and honesty.[16]

§ 119. Knowledge.

Misrepresentation by insured as to value of automobile will not avoid the policy where insurer's agent examines the property.[17] Misdescription by insured of place of storage is no defense where the insurer's agent has knowledge of the place where the car is kept.[18] So, where incorrect statements of facts appearing in a policy of insurance as warranties are not furnished by the insured or his agent, but are ascertained by the insurance company or its representative from some other source and place, they are waived as such, notwithstanding their designation as warranties.[19] The requirement of an automobile theft policy as to uncon-

13. Solomon v. Fed. Ins. Co., 176 Cal. 133, 167 Pac. 859.
14. Mazeika v. Auto Underwriters of America, 17 Ill. Law Review, 226 Ill. App. 239.
15. Stanley v. Belt Auto Ind. Ass'n, 112 Kan. 412, 210 Pac. 1096.
16. Day v. St. Paul F. & M. Ins. Co., 111 Wash. 49, 189 Pac. 95.
17. Walker v. Fireman's Fund Ins. Co., 114 Ore. 545, 234 Pac. 542.
18. White v. Home Mut. Ins. Ass'n of Iowa, 189 Ia. 1051, 179 N. W. 315.
19. Northwestern Nat. Ins. Co. v. Chambers, 24 Ariz. 86, 206 Pac. 1081.

ditional ownership by insured, and a breach of warranty as to the cost of the car are waived by the insurance company's conduct, after knowledge of the breach, in retaining the premium and the automobile itself, after recovery was had.[20] Knowledge of the agent is knowledge of the company. So, where an agent of an automobile insurance company fills out an application representing the company and not the applicant, and has knowledge as to the model and year of the car, such knowledge is brought home to the company so that the insured is not under such circumstances liable for such inaccuracies of statement as the agent had knowledge of, especially where the agent fills out the application from his own information and it is signed by the applicant in good faith, without any intention to deceive. But the insured cannot excuse misrepresentations of fact in such an application by showing that he signed the application without reading it.[21]

§ 120. Untrue statement not made by assured.

In an automobile policy indemnifying the owner against loss or damage arising from collision, the policy which was mailed to the assured, contained a statement which, though untrue, had never been made by him. The insurer contended that the assured, by accepting and retaining the policy, had made a misrepresentation with respect to the false statement contained in the policy. The court sustained the vadidity of the policy.[22]

§ 121. Open policy covering many cars.

Where insurer issuing general open policy covering many cars, covered each individual car by separate note, any misrepresentation as to any car defeats recovery for that

20. Auto. Ins. Exchange v. Wilson, 144 Md. 249, 124 Atl. 876.

21. Standard Auto Assur. Ass'n v. West, 203 Ky. 335, 262 S. W. 296; See Kenney v. Franklin Fire Ins. Co., of Philadelphia (Mo. App.), 247 S. W. 249.

22. Davern v. American Mutual Liability Ins. Co., 241 N. Y. 318, 150 N. E. 129 (1925), aff'g 214 App. Div. 754, 209 N. Y. S. 818.

car alone, and such misrepresentation cannot be construed as involving all cars covered by the policy.[23]

§ 122. Renewal.

If misrepresentation is made in securing original policy, it would not constitute a defense in an action for recovery for loss on the renewal.[24]

§ 123. Pleading.

Where certain misrepresentations are pleaded, questions should be confined to the misrepresentations so pleaded.[25]

§ 124. Defense.

DEFENSE OF FRAUDULENT REPRESENTATION IS NOT DEFEATED BY SHOWING THAT FALSE STATEMENT DID NOT CONTRIBUTE TO THE LOSS.

It is undoubtedly the general rule that the insurer has a good defense to recovery on an automobile insurance policy on the ground that fraudulent representations were made by the assured in his application for insurance, and that such representations related to matters material to the risk, and where, if a true answer had been made, no contract of insurance would have been entered into.

Such a defense is not defeated by a showing that the false statement did not contribute to the loss.[26]

§ 125. Evidence.

Evidence that assured consented to issuance of policy of insurance in the name of his wife as owner was not sufficient to prove defense of change of ownership of insured car.[27]

23. Walker v. Fireman's Fund Ins. Co., 114 Ore. 545, 234 Pac. 542.
24. Solomon v. Fed. Ins. Co., 176 Cal. 133, 167 Pac. 859 (1917).
25. Zackwick v. Hanover F. Ins. Co. (Mo. App.), 225 S. W. 135 (1920).
26. Goodell v. Union Automobile Ins. Co., 111 Neb. 228, 196 N. W. 112 (1924).
27. Suetterlein v. Northern Ins. Co. of N. Y., 130 Misc. 420, 224 N. Y. S. 409 (1927).

§ 126. Misrepresentations to adjuster—Jury.

Concealment or misrepresentation of material facts by the assured in stating to the adjuster that the insured car had never been in any collision, fire or theft, and the further alleged misrepresentation concerning renewal insurance, it has been held, are issues of fact for the jury, and do not require as a matter of law a directed verdict.[28]

§ 127. Instructions.

If there is a breach of warranty of the provision of the automobile insurance policy against encumbrances and overvaluation of the insured car by the assured, the court should instruct the jury that the insurer is not liable. It is error for the court to add, if any statements in the application are false, the proviso that the jury should further find that such statements have so materially affected the risk that the company would not have issued the policy at the premium charged had it known them to be false.[29]

§ 128. Instructions—Fraud.

The instruction was approved by the appellate court in a Washington case, that fraud must be proven by potent and strong evidence, as it is the policy of the law to "deal with men on the basis of their honesty and with the presumption that men are dealing with one another in spirit of fairness and honesty."[30]

§ 129. Motion for judgment notwithstanding verdict.

Where the evidence showed misrepresentation in procuring the insurance and there was insufficient evidence to overcome the presumption of intent to deceive so as to make a question for the jury, it was proper for the court to grant

28. Shapiro v. Security Ins. Co., 256 Mass. 358, 152 N. E. 370 (1926).
29. Andrews v. Bull Dog Auto Fire Ins. Ass'n of Chicago (Mo. App.), 258 S. W. 714 (1924), (Mo. App.), 291 S. W. 508 (1927).
30. Day v. St. Paul F. & M. Ins. Co., 111 Wash. 49, 189 Pac. 95 (1920).

defendant's motion for judgment notwithstanding the verdict.[31]

§ 130. Statute.

New Hampshire statute providing that description of property and statements concerning its value and the title of the insured thereto in an application for insurance or in a policy of insurance shall not be treated as warranties, and the policy shall not be avoided by reason of any mistake or misrepresentation, unless it appears to have been intentionally and fraudulently made, does not refer to the negotiations of a contract for an insurance policy, but to the application and policy itself.[32]

(B) DESCRIPTION—COST.

MISREPRESENTATION AS TO THE COST OF AN AUTOMOBILE BY THE INSURED IS MATERIAL TO THE RISK AND AS A GENERAL RULE WILL AVOID THE POLICY.

§ 131. In general.

A representation as to the cost or price of an insured automobile is usually considered material to the risk, and as a general rule misrepresentation as to such fact will avoid the policy.[33]

31. Day v. St. Paul Fire & Marine Ins. Co., 111 Wash. 49, 189 Pac. 95 (1920).

32. Davidson v. American Central Ins. Co., 80 N. H. 552, 119 Atl. 707 (1923); See Solomon v. Federal Ins. Co., 176 Cal. 133, 167 Pac. 859; Lummus v. Fireman's Fund Ins. Co., 167 N. C. 654, 83 S. E. 688, L. R. A. 1915D, 239; Farber v. American Automobile Ins. Co., 191 Mo. App. 307, 177 S. W. 675; Lindstrom v. Employers' Indemnity Corp., 146 Wash. 484, 263 Pac. 953.

33. Fidelity-Phoenix Fire Ins. Co. v. Queen City Bus & Transfer Co. (C. C. A.), 3 Fed. (2nd) 784 (1925); Atlante Campagna v. Newark Fire Ins. Co., 259 Mass. 205, 156 N. E. 54 (1927); Bloom v. Ohio Farmers' Ins. Co., 255 Mass. 528, 152, N. E. 345 (1926); Farber v. American Auto. Ins. Co., 191 Mo. App. 307, 177 S. W. 675 (1915); Kiefer v. Girard Fire & Marine Ins. Co. of Phila., 285 Pa. 589, 132 Atl. 706 (1926); North River Ins. Co. v. Lewis, 137 Va. 322, 119 S. E. 43 (1923); Puro v. Franklin Ins. Co., 83 Pa. Superior Ct. 164 (1924); Benvenuto v. Central Manfacturers' Mutual Ins. Co., 80 Pa. Superior Ct. 213 (1922); Dickenson v. Belt Automobile Indemnity Co., 82 Pa. Superior Ct. 520 (1924); Affleck v. Potomac Ins. Co. —— R. I. ——, 140 Atl. 469 (1928); Miller v. Commercial Union Assur. Co., Ltd., 69 Wash. 529, 125 Pac. 782 (1912).

The assured must place a fair and reasonably truthful valuation on the insured car when the statements which he makes in his application are agreed to be warranties. Fraudulent valuation will avoid the policy. Mere overvaluation of a second-hand car, however, does not constitute fraud. But an excessive valuation may be presumptive evidence of fraud. It is usually a question of fact for the jury to determine whether or not the statements as to the value were intentionally false.

§ 132. Illustrations.

Where insured states in application that the automobile was new when purchased by him and that it cost him $4,500, both of which statements were false, such statements were not representations, but warranties, the falsity of which avoided the policy.[34] But, where at the time of the application for insurance by the insured, the agent of the insurer inspects the automobile and judges for himself and the company its condition and value, the policy is not void on the ground of misrepresentation and fraud of the insured in falsely describing and valuing the car.[35] The question as to whether or not the insured misrepresented the cost of the car and its equipment in applying for insurance, and whether such misrepresentation was material, is oftentimes for the jury.[36]

§ 133. Exchange value.

Misrepresentation is not shown by the fact that the insured stated in his application that he traded his Ford car with cash for the car insured, when, as a matter of fact, he traded his Ford car and cash for another car, which he traded for the insured car.[37]

34. Miller v. Commerical Union Assur. Co., Ltd., 69 Wash. 529, 125 Pac. 782.
35. Franklin Fire Ins. Co. v. Britt (Tex. Civ. App.), 254 S. W. 215 (1923).
36. Bloom v. Ohio Farmers' Ins. Co., 255 Mass. 528, 152 N. E. 345.
37. White v. Home Mut. Ass'n, 189 Iowa 1051, 179 N. W. 315 (1920); See Devenny v. Auto Owners' Inter-Insurance Ass'n of Washington, 124 Wash. 453, 214 Pac. 833; Stanley v. Belt Automobile Indemnity Ass'n, 112 Kan. 412, 210 Pac. 1096 (1922).

§ 134. Exchange value—Second-hand car.

Where the evidence showed that the insured did not pay cash for the car but traded property for it, and misunderstood the question as to time of service as referring to the length of time he had used the car, rather than the length of time the car had been used altogether, the finding of the jury that the insured's representations so made were not material to the risk was proper.[38]

§ 135. Accessories.

The answer to the question in an automobile fire policy as to the value of the car was not a warranty but a representation, where the discrepancy amounted to $100, and it could be fully explained by the purchase of accessories.[39]

§ 136. Cost with equipment.

In a Massachusetts case, one of the warranties of the policy was that the car was second-hand when bought and that its actual cost to the insured, including equipment, was $2,400. Evidence disclosed that the assured had purchased the car for $2,200 and had immediately expended $200 for new equipment. The court instructed the jury that if the assured did anything to the car, either in the way of equipment or additions that might be considered fairly necessary to make it a complete running car, they might consider such evidence in deciding whether the actual cost to the assured, including equipment, was $2,400, within the meaning of the word "equipment." It was held on appeal that the evidence relating to expenses for new equipment was properly admissible, and that the instruction was not prejudicial to the rights of the insurance company.[40]

38. St. Paul F. & M. Ins. Co. v. Huff (Tex. Civ. App.), 172 S. W. 755 (1915).

39. Scott v. Bankers' Auto Ins. Ass'n, 224 Ill. App. 606 (1922).

40. Shapiro v. Security Ins. Co., 256 Mass. 358, 152 N. E. 370 (1926); See Standard Auto Ins. Ass'n v. West, 203 Ky. 335, 262 S. W. 296.

§ 137. Conduct of the agent.

In an action on an automobile fire policy in Mississippi, it was held error for the trial court to refuse to permit the insured to introduce testimony to prove that the insurer's agent was a general agent, and that the agent saw the car at the time and placed his own valuation thereon without further representation by the insured.[41]

§ 138. Overvaluation must be fraudulent.

It has been held in a Texas case that overvaluation of an insured automobile must be fraudulently made to avoid the policy.[42]

§ 139. Cost of financing.

In making warranty as to the cost of an insured automobile, where the purchase is made on bailment lease, it is improper to include cost of financing.[43]

§ 140. Jury.

The question as to whether or not the insured misrepresented the cost of the car and its equipment in applying for insurance, and whether such misrepresentation was material, is for the jury.[44]

§ 141. Inspection of insured car by insurer.

It was held in a Texas case, where the insurer sought the insurance and after an inspection of the car placed its own value on it when the insured was not present, it was held that the insurer had no valid complaint about the value.[45]

41. Knight v. Hartford Fire Ins. Co., 142 Miss. 382, 107 So. 526 (1926).
42. Bull Dog Automobile Ins. Co., v. Crowley (Tex. Civ. App.), 281 S. W. 622 (1926).
43. Monaco v. Queen Ins. Co. of America, 86 Pa. Super. Ct. 517.
44. Bloom v. Ohio Farmers' Ins. Co., 255 Mass. 528, 152 N. E. 345 (1926).
45. Corporation of Royal Exch. Assur. of London v. Puckett (theft), (Tex. Civ. App.), 246 S. W. 705 (1922).

In an action on a theft policy covering an automobile where agent testified that at the time of the application he saw and inspected the car and judged it was in good condition and considered it a good risk for $600, the amount of the policy, it was held that the evidence did not warrant a conclusion that such fraud or misrepresentation was practiced by insured in regard to the value as would preclude recovery.[46]

§ 142. Valued policies.

Representation concerning the cost of an insured car is particularly important if the policy is valued. A wilful misrepresentation as to the cost or value which is relied on by the insurer will defeat recovery.[47]

§ 143. Statute.

Misrepresentation as to the cost of an insured automobile is considered such a breach of warranty that it will avoid the insurer's liability under the policy even though there is a statute providing that the warranty of any fact or condition incorporated in a policy of fire insurance purporting to be assented to by the insured, which should not materially affect the risk insured against, would be deemed and taken as a representation only.[48]

(C) MODEL.

STATEMENT AS TO THE AGE OF AN AUTOMOBILE IN AN APPLICATION FOR INSURANCE IS GENERALLY HELD TO BE MATERIAL, THE FALSITY OF WHICH WILL AVOID THE POLICY.

NOTICE. WHERE THE APPLICATION GIVES THE CORRECT SERIAL OR FACTORY NUMBER, FROM WHICH THE INSURER CAN ASCERTAIN THE EXACT YEAR OF MANUFACTURE, IT HAS BEEN HELD THE INSURER IS CHARGEABLE WITH NOTICE OF THE CORRECT YEAR OF

46. Franklin Fire Ins. Co. v. Britt (Tex. Civ. App.), 254 S. W. 215 (1923).

47. Solomon v. Federal Ins. Co., 176 Cal. 133, 167 Pac. 859 (1917); Cohen v. Ft. Dearborn Casualty Underwriters (Mo. App.), 285 S. W. 1024 (1926); Andrews v. Bulldog Auto. Fire Ins. Ass'n (Mo. App.), 258 S. W. 714 (1924).

48. Farber v. American Auto Ins. Co., 191 Mo. App. 307, 177 S. W. 675 (1915).

MANUFACTURE, AND IS ESTOPPED FROM RELYING ON DEFENSE OF MISREPRESENTATION.

MISTAKE. IF AUTOMOBILE IS INSURED BY WRONG NUMBER THROUGH NO FAULT OF ASSURED, BUT BECAUSE OF FAILURE OF INSURER'S AGENT TO OBTAIN CORRECT INFORMATION, DEFENSE OF MISREPRESENTATION IS NOT TENABLE.

JURY. QUESTION MAY BE FOR JURY TO DETERMINE WHETHER OR NOT THERE WAS A MEETING OF MINDS, EVEN THOUGH DESCRIPTION IS INCORRECT.

§ 144. In general.

The courts generally refuse recovery on automobile insurance policies as matter of law, where misdescription relating to nature of property is unquestionable material.[49] Insured is not entitled to recover for loss of automobile where there is a widely divergent description of the car insured from that described in the proof of loss. Thus, recovery cannot be had against the insurer where the misdescription relating to the purchase of the car is as to the age of the car. This is true even though the policy was not read by the insured, if in fact the representation was so made by the insured to the agent of the insurer.[50]

Misrepresentation of the model of an automobile in an application for insurance involves a material fact and will avoid the policy, where the policy provides "that entire policy shall be void if the insured has concealed or misrepresented in writing or otherwise any material fact or circumstance concerning this insurance or the subject thereof."[51] A warranty that the automobile insured against theft was a 1916 model when in fact it was a 1913 model was ma-

49. Solomon v. Fed. Ins. Co., 176 Cal. 133, 167 Pac. 859 (1917); Smith v. American Auto Ins. Co., 188 Mo. App. 297, 175 S. W. 115 (1915); Harris v. St. Paul F. &. M. Ins. Co., 126 N. Y. S. 118 (1910); Reed v. St. Paul F. & M. Ins. Co., 165 App. Div. 660, 151 N. Y. S. 274 (1915); Day v. St. Paul F. & M. Ins. Co., 111 Wash. 49, 189 Pac. 95 (1920); North British & Mercantile Ins. Corp., Ltd. v. San Francisco Securities Corporation, 30 Ariz. 599, 249 Pac. 761; Automobile Owners Ins. Ass'n v. Hennesey (Tex. Civ. App.), 299 S. W. 281; Sawyer v. National Fire Ins. Co., —— S. D. ——, 220 N. W. 503 (1929).

50. Affleck v. Potomac Ins. Co., —— R. I. ——, 140 Atl. 469 (1928), reargument denied, 141 Atl. 183.

51. Reed v. St. Paul F. &. M. Ins. Co., 165 App. Div. 660, 151 N. Y. S. 274.

terial and defeated recovery on the policy.[52] Such a statement is a breach of warranty as to the description of the automobile insured and not a statement of opinion or belief or of a matter which the insurance company knew was not within the personal knowledge of the applicant.[53] Statements in an application for fire insurance on an automobile that the actual cost of the car was $1,150.00, when in fact it was only $950.000, and that it was a 1919 model, when it was a 1918 model, are material misrepresentations.[54] So, where insured stated in his application for automobile insurance that the automobile was purchased in 1921, when in fact it was purchased in November, 1920, there was a misstatement of fact sufficient to avoid the policy.[55] But the age of an automobile upon which insurance is sought is material only in so far as it affects its value and the moral hazard. So misrepresentation based solely upon statement as to the age of the automobile is insufficient.[56] Where correct information is given in an application from which the company can easily ascertain the truth or falsity of the other purported facts subsequently alleged to have been misrepresented, the question of the materiality of such alleged misrepresentations is one of fact and not of law.[57] The fact that serial number of car was for 1919 model and engine number was for previous year did not prove that insured was guilty of misrepresentation.[58] But where the application for automobile fire insurance incorrectly states the year model but gives the correct serial number

52. Felakos v. Aetna Ins. Co. (N. J. Sup.), 119 Atl. 277 (1922).

53. Saglineni v. Merrimack Mut. Fire Ins. Co., 132 Misc. Rep. 122, 228 N. Y. S. 537.

54. Standard Auto. Ins. Ass'n v. West, 203 Ky. 335, 262 S. W. 296.

55. Atlante Campagna v. Newark F. Ins. Co., 259 Mass. 205, 156 N. E. 54 (1927).

56. Traynor v. Auto. Mut. Ins. Co., 105 Neb. 677, 181 N. W. 566 (1921), 14 A. L. R. 195.

57. Berry v. Equitable F. &. M. Ins. Co. (Mo. App.), 263 S. W. 884 (1924), aff'd 317 Mo. 1119, 298 S. W. 63.

58. Offutt v. Nat. Fire Ins. Co. of Hartford, Conn. (Mo. App.), 273 S. W. 161 (1925).

from which the company can easily ascertain the correct year model, the materiality of such representation is a question for the jury.[59] Where it appears that the insured told the agent of the company that the model of the car was not known, both thereafter going to the former owner to ascertain the model, the application then reading that the automobile was a 1919 model when in fact, after the loss, it turned out to be a 1916 model, the policy is not voided and the insurer is liable.[60] So evidence that insured in applying for insurance on her automobile showed the agent the bill of sale which stated the car was made in 1917 and that the agent remarked it was a 1918 model, built in 1917, there was sufficient evidence to warrant the jury in finding that the insured did not misrepresent the model of the insured car.[61] Where the evidence disclosed by the uncontradicted testimony of the insured that he told the agent that he did not know the number of his motor or the name of the dealer from whom he purchased the car and that the car cost between $700 and $800 with equipment that he had added since purchasing, and that thereupon the agent inserted in the application the number of the motor and the name of the seller based on the description furnished by the applicant, and stated the purchase price at $800, the good faith of the applicant was sufficiently manifested, and the company could not defeat recovery because the falsity of the answers was due to the act of the agent and with his knowledge.[62]

§ 145. Misrepresentation—New car.

A warranty in an insurance policy covering theft of an automobile that the automobile was a new car is material

59. Berry v. Equitable F. &. M. Ins. Co. (Mo. App.), 263 S. W. 884 (1924), aff'd 317 Mo. 1119, 298 S. W. 63.

60. Johnson v. Fed. Auto. Ins. Ass'n (Ill. App.), 18 Ill. Law Rep. 27.

61. Kenney v. Franklin Fire Ins. Co. (Mo.), 247 S. W. 249 (1923).

62. Standard Auto. Ins. Ass'n v. Russell, 199 Ky. 470, 251 S. W. 628.

to the risk and if the car was not in fact a new car there can be no recovery.[63]

§ 146. Misrepresentation defeats recovery.

In a New Jersey case, the court held that the insurer was not liable for the loss of an automobile by theft where the assured had represented the car as a 1917 model when in fact it was a 1915 model.[64]

§ 147. Insurable value.

Policy was under consideration in a New York case, where a 1906 automobile had been described as a 1907 model. The court there said: "It is perfectly clear that a used car, constructed in 1906, and insured in November, 1909, is not of the same insurable value as a car constructed in 1907, and the statement of the plaintiff that the car was of the 1907 model was a material representation upon which the defendant had a right to rely, in issuing a valued policy in the sum of $2,000."[65]

§ 148. Material fact.

Misrepresentation as to the model and age of an insured automobile in an application for insurance is a misrepresentation of a material fact, for the value of the car is clearly related to the year of its manufacture.[66] Thus it was held in a New York case, where the policy provided that it would be void if the insured had concealed or misrepresented any material fact or circumstance, misrepresentation that the insured automobile was a 1910 model when it was in fact a 1906 model was a misrepresentation of a material fact and avoided the policy.[67]

63. North River Ins. Co. v. Atkinson, 137 Va. 313, 119 S. E. 46 (1923).

64. Silverman v. American Eagle Fire Ins. Co. (N. J. L.), 126 Atl. 468 (1924).

65. Harris v. St. Paul F. & M. Ins. Co., 126 N. Y. S. 118 (1920).

66. Douglas v. Ins. Co. of N. A., 215 Mich. 529, 184 N. W. 539 (1921).

67. Reed v. St. Paul F. &. M. Ins. Co., 165 App. Div. 660, 151 N. Y. S. 274 (1915).

§ 149. Question is whether higher premium rate would have been charged.

It was held in a California case that where car insured against fire and theft was represented as 1921 model, if in fact it was 1920 model, it was a misrepresentation of fact material to the risk, which would avoid policy, as affecting or rejecting risk, where higher premium rate was charged for 1920 model than for model of 1921.[68]

§ 150. Where insurer would have rejected application—Good faith not a defense.

In a Missouri case, it was shown that the rate sheet issued to its agents prohibited the writing of a fire insurance policy upon any automobile prior to a 1908 model. The insured represented that the insured car was a 1910 model when it was in fact a 1907 model. The court held that the representation was material as a matter of law, whether it was made in good faith or not, for it affected the very subject-matter of the suit. If the year model had been correctly disclosed, the insurance company would have refused to insure the car. The opinion of the court reads: "It would seem to be in accord with common knowledge that a five year old automobile would be less valuable then, and not so safe a risk as one two years old, and that the effects of wear and tear would be more likely to manifest themselves in the older car. If the fact that the machine is five years old instead of two is not material to the risk, we cannot well see what would be."[69] The court further held that the insured's representation as to the year model of the car was not avoided by the fact that the insurance agent examined the car, when, as a result of such examina-

68. Bennett v. Northwestern National Ins. Co., 53 Cal. App. 800, 257 Pac. 586 (Cal. Civil Code, Secs. 2565, 2581).

69. Smith v. American Auto Ins. Co., 188 Mo. App. 297, 175 S. W. 113, 114 (1915).

tion, he could not ascertain or determine what year the insured car was manufactured.[70]

§ 151. Premium rate dependent upon year model.

Where the rate per $100 and the amount of the fire insurance were dependent upon the year of manufacture, it has been held in Missouri that misrepresentation as to the year model of the insured car will void the policy even though the agent of the insurer was in possession of a book from which he could ascertain the year model of the car from the number of the car motor;[71] but the Missouri court subsequently held that it was no defense to liability by the insurer that the insured car was represented to have been made several years later than it really was where the evidence disclosed that the age of the car was not definitely known and the agent of the insurer made examination of the car and satisfied himself as to its age.[72]

§ 152. Assured acts in good faith and insurer shares responsibility.

Where the insured acts innocently and in good faith in making representation as to the year model of an automobile, there being no intent to mislead or deceive, and the agent of the insurance company knows of the insured's limited knowledge thereof and shares in the responsibility for describing the yearly model of the car in the policy, the insurer will not thereafter be permitted to rely upon such erroneous representation as a defense to liability on the policy. In a Missouri case, the insured exhibited to the agent bill of sale of the automobile wherein it was described as a 1917 car, but the agent remarked that it was a "1918 model built in 1917" and made a pencil memorandum accordingly for use in writing up the policy. The

70. Smith v. American Auto Ins. Co., 188 Mo. App. 297, 175 S. W. 113, 114 (1915).

71. Hughes v. Hartford Fire Ins. Co. (Mo. App.), 263 S. W. 883.

72. Berryman v. Maryland Motor Car Ins. Co., 199 Mo. App. 503, 204 S. W. 738 (1918).

court held the defense was untenable, especially as the insurer had ample opportunity to make examination of the car.[73]

§ 153. Correct serial number but erroneous year model.

In a recent Missouri case, which seems to have overruled previous cases, it has been held that in view of statutory enactments,[74] a misrepresentation as to the year model would not void the policy, where the application gave the correct serial or factory number, from which the company could have ascertained the exact year of manufacture. The insurer was chargeable with notice of the correct year of manufacture, and was thereby estopped from relying upon the defense of misrepresentation.[75]

§ 154. Correct number and type of car.

In a Maryland case, the application contained the manufacturer's number and the type of car. Apparently, the only way to ascertain the year of manufacture was to compare the number of the car with the catalogue of the company, but this was not done. The insured evidently acted in good faith, and the agent of the insurer was not deceived. Under the circumstances, the court held that the statement of the insured as to the year the car was built did not constitute a breach of warranty.[76]

§ 155. Good faith.

A warranty that a car was a 1917 model when in fact it was a 1915 model was a breach of warranty, even though the assured purchased the car on the representation that it was a 1917 model and acted in good faith.[77]

73. Kenney v. Franklin Fire Ins. Co. (Mo. App.), 247 S. W. 249 (1923).
74. Mo. Rev. St. 1919 Secs. 6233, 6234.
75. Berry v. Equitable F. &. M. Ins. Co., 317 Mo. 1119, 298 S. W. 63 (1927), aff'g (Mo. App.), 263 S. W. 884 (1924).
76. British & Foregin Marine Co. v. Cummings, 113 Md. 350, 76 Atl. 571 (1910).
77. Boudrequ v. Imperial Guarantee & Acci. Ins. Co. (Quebec), 2 D. L. R. 57 (1923).

§ 156. Failure of assured to read statement.

Failure of the assured to read the statements after they were made and correct the errors will not deprive him of his right of recovery based on the facts.[78]

§ 157. Where insured car is erroneously described by insurer on personal information of its agent.

Statements made in fire and theft insurance policy as to the year the car was made and whether it was new will not avoid the policy for breach of warranty because they are erroneous, where it is shown that the assured did not make such representations, but that they were written in on the personal information of the insurer's agent.[79] Says the Maryland court on this question: "An insurance company is regarded as knowing what it ought to know, and it cannot set up a material misrepresentation in defense of an action on a policy, if with proper attention to its business it could have been apprised of the truth of the subject of the representation. As if it knows that such statement was false and proceeds as if it were true, it will be estopped to set it up in defense.[80] Likewise it was held in a Missouri case, where the agent of the insurer personally assumed responsibility for ascertaining the number of the insured car from the former owner, the insurer could not thereafter defend on the ground that the car as to number was erroneously described, particularly as it was not contended that the company did not intend to cover the automobile insured.[81]

§ 158. Agent who examines car presumed to know year model.

Even though the policy provides that any misrepresentation of material facts or circumstances concerning the sub-

78. Northwestern National Ins. Co. v. Chambers, 24 Ariz. 86, 206 Pac. 1081 (1922).

79. Northwestern National Ins. Co. v. Chambers, 24 Ariz. 86, 206 Pac. 1081 (1922).

80. British & Foreign Marine Ins. Co. v. Cummings, 113 Md. 350, 76 Atl. 571.

81. Caldwell v. City of New York Ins. Co. (Mo. App.), 245 S. W. 602 (1922).

ject of insurance will avoid the policy, it has been held that mere proof of the fact that insured's statement that the car was a 1918 model would not defeat recovery where it was shown that insurer's agent made examination of the car and could have readily ascertained that the car was not a 1918 model. Presumptively, the agent of the insurer had such knowledge. The court said: "The company cannot defend on the ground that the policy was void at its inception if it had knowledge of the facts when it executed the contract and took the premium. On general principles, a knowledge which would be sufficient to lead any prudent person to inquire about the matter, when it could easily be ascertained, ought to be regarded as a knowledge of the fact. And where the agent had knowledge of the existence of facts which would render the contract void in its inception, if its provisions were insisted upon, it would be presumed that such provisions were waived, because the courts will not impute to the company the fraudulent intent to deliver and receive pay for an invalid policy." [82]

§ 159. Where solicitor makes personal examination.

The insured is not liable for such a material misrepresentation as is sufficient for an insurance company to avoid liability on theft insurance policy where he stated to the solicitor of the company that the automobile was new when the solicitor personally made examination of the car, and reported all the facts to the company's local agent. The solicitor, even through devoting but part of his time to the insurance business, was the agent of the insurer especially as he was sharing the commission with the company's local agent.[83]

§ 160. No intention to deceive.

Insurer's defense that the assured had falsely repre-

82. Stanley v. Belt Auto Indemnity Ass'n 112 Kan. 412, 210 Pac. 1096 (1922).

83. Carroll v. Union Marine Ins. Co., Ltd. of Liverpool, (Mo. App.), 249 S. W. 691 (1923).

sented that the insured automobile was new, when as a matter of fact it had been used as a demonstration car, was not sustained where there was no intent by insured to deceive the insurer in that respect.[84] But where plaintiff's husband represented that an insured automobile was a 1911 model with knowledge at the time it was a 1910 model, and that it was a new car, knowing it had been used before his wife's purchase of it, a presumption of intention to deceive arises which was not overcome by his testimony that he thought the car was as good as new and that he either forgot the date of manufacture or considered there was no difference.[85]

§ 161. Temporary use—Vexatious refusal to pay.

The insurer defended an action on the ground that the assured had represented that he had purchased the car new, when, as a matter of fact, it had been in use three weeks prior to the purchase. The court held that such temporary use was immaterial to the risk, and that the jury's finding of a vexatious refusal to pay and the allowance of damages and attorney's fees was not improper.[86]

§ 162. Subsequent conversation.

But insurer is not estopped from relying on misrepresentations made as to the model of the automobile by reason of subsequent conversation of the insured with insurer's agent.[87]

§ 163. Conduct.

There was held to be a waiver of a representation in a theft insurance policy that the cost of the car was a certain amount and that assured was its sole owner where the as-

84. Suetterlein v. Northern Ins. Co. of N. Y., 130 Misc. Rep. 420, 224 N. Y. S. 409 (1927).

85. Day v. St. Paul F. &. M. Ins. Co., 111 Wash. 49, 189 Pac. 95 (1920).

86. Lundberg v. Equitable Fire & Marine Ins. Co. (Mo. App)., 285 S. W. 741 (1926).

87. Day v. St. Paul F. &. M. Ins. Co., 111 Wash. 49, 189 Pac. 95 (1920).

sured after the car was stolen made a statement indicating the cost of the car, and the insurer thereafter, without denying liability, recovered the stolen car, retained it and also the premium, and made an offer of settlement.[88]

§ 164. Evidence. (a) Certificate of registration.

Where the insurer denied liability under a fire and theft insurance policy, on the ground that the insured falsely represented the insured car as 1921 model instead of 1920 model, statements contained in certificate of registration, although admissible in evidence, were not conclusive as to the year model of the automobile.[89]

§ 165. Evidence. (b) Statute.

Under Washington statute providing that no oral or written misrepresentation or warranty made in the negotiations for insurance should be deemed material unless made with an intent to deceive, representations in application for automobile insurance that insured automobile was a 1917 model, when in fact it was a 1915 model, did not avoid the policy unless there was an intent to deceive.[90]

§ 166. Evidence. (c) Number and year model not identical.

The plaintiff's proof was insufficient, in an action to recover for theft of an automobile, where the only similarity between the car which the plaintiff had in his possession and that covered by the policy was in the name of the car; the car number and year model were not identical.[91]

§ 167. Evidence. (d) New or second-hand.

In an action on a theft insurance policy, the insurance company defended on the ground of misrepresentation in

88. Auto. Ins. Exch. v. Wilson, 144 Md. 249, 124 Atl. 876 (1923).

89. Bennett v Northwestern Nat. Ins. Co., 53 Cal. App. 800, 257 Pac. 586 (1927).

90. Devenny v. Automobile Owners' Inter-Insurance Ass'n, 124 Wash. 453, 214 Pac. 833.

91. Hessen v. Iowa Auto. Mut. Ins. Co., 195 Iowa 141, 143, 190 N. W. 150 (1923), 30 A. L. R. 657.

the application for insurance, to wit, that the insured had represented that the insured car was new. The car had been purchased by insured's employer, with the agreement that the title should remain in the latter until the insured had earned enough money to pay for it. The insured paid for the car within three months, when application for the insurance was made. The court held that the evidence of the defendant was that the car was new as represented.[92]

§ 168. Evidence. (e) Directed verdict held improper.

In an action on a policy insuring a 1915 automobile against theft, where the defense was misrepresentation of the age of the insured car, the insurer produced no evidence that the factory number alleged was of the 1912 series, and insured, though he threw no light on the variance in numbers, testified that the car purchased was a 1915 model, that it was correctly described in the application except as to number, and that it was his only car, and the car that was stolen. It was held that directed verdict for the insurance company was properly refused.[93]

§ 169. Jury. (a) Misdescription.

In an action on an automobile theft insurance policy it has been held that whether there was a misdescription of the insured car was a question for the jury.[94]

§ 170. Jury. (b) Evidence.

Where the evidence was that the insured showed the insurer's agent a bill of sale stating that the insured car was made in 1917, and the insurer's agent said the car was a 1918 model made in 1917, the finding of the jury that the insured did not represent the car as a 1918 model was sustained.[95]

92. Rabinowitz v. Vulcan Ins. Co., 90 N. J. L. 332, 100 Atl. 175 (1917).

93. Douglas v. Ins. Company of North American, 215 Mich. 529, 184 N. W. 539 (1921).

94. Continental Ins. Co. v. Burns, 144 Md. 429, 125 Atl. 232 (1924).

95. Kenney v. Franklin Fire Ins. Co. (Mo. App.), 247 S. W. 249 (1923).

§ 171. Jury. (c) Conflict.

Where the application for insurance stated that the insured automobile was new and that it had been purchased from the manufacturer at a cost of $2,300, and the assured testified that he had told the agent that the car was purchased second-hand for $1,850, and had not read the statements made in the application for the insurance, and where the assured had purchased certain accessories for the car and additional insurance was taken out by attaching a rider to the policy in which it was stated the car was new, the question was held to be one for the jury.[96]

§ 172. Jury. (d) Meeting of minds even though description incorrect.

But in Massachusetts the court has taken the liberal position that in the interpretation of automobile fire insurance contracts, where the evidence is one of fact, a jury may find from all the evidence that there was a meeting of minds of the parties, even though the description was incorrect.[97] Thus, where the action involved three automobile fire insurance policies, one a non-valued policy and the others valued, which covered cars of foreign manufacture, and there were many accurate terms of description, the evidence was held to be such that the jury could not only properly determine that there was a meeting of minds as to the inaccurate description of one fact, but could even find that the machines were of the year models stated in the policies.[98]

§ 173. Jury. (e) Exchange value—Examination by insurer's agent.

Where the insurer on a fire insurance policy defended on the ground that the owner falsely warranted in the ap-

96. Andrews v. Bull Dog Auto F. Ins. Ass'n of Chicago (Mo. App.), 258 S. W. 714 (1924).

97. Locke v. Royal Ins. Co., 220 Mass. 202, 107 N. E. 911 (1915).

98. Locke v. Royal Ins. Co., 220 Mass. 202, 107 N. E. 911 (1915).

plication that the car was a 1918 model, and had paid a certain price for the car, and the evidence showed that the price was based upon exchange of property and the agent of the insurance company had examined the insured car, it was held that the jury was warranted in finding that there was no purpose of evasion in representation.[99]

§ 174. Estoppel. Husband and wife.

Misrepresentation as to the age and model of an insured car by insured's husband was held a breach of warranty, and the insurer was not estopped from setting up and relying upon such a defense even though during a later conversation with the insured's husband, there was no further statement made to mislead the agent of the company.[1]

§ 175. Appeal and error.

There was no reversible error in admitting testimony regarding a conversation between the insured and the insurer to ascertain what year's make the car was, in which they agree to cover it as a 1917 model when in fact it was a 1916 model.[2]

(D) NUMBER.

MOTOR NUMBER OF AUTOMOBILE BY WEIGHT OF AUTHORITY, IS MERELY DESCRIPTIVE; THE GIVING OF AN ERRONEOUS NUMBER DOES NOT CONSTITUTE BREACH OF WARRANTY OR AVOID THE INSURER'S LIABILITY.

§ 176. In general.

The rule that a warranty as to the year a car is made is a material warranty and a breach of such warranty in a policy of insurance voids the policy, does not apply as to a misdescription of an automobile in a policy of insurance

99. Stanley v. Belt Auto Indem. Ass'n, 112 Kan. 412, 210 Pac. 1096 (1923).

1. Day v. St. Paul F. & M. Ins. Co., 111 Wash. 49, 189 Pac. 95 (1920).

2. Whitcomb et al. v. Automobile Ins. Co. of Hartford, 167 Minn. 362, 209 N. W. 27 (1926).

as to its number.[3] Where the factory number is given, the company is placed in a position to ascertain the year of manufacture, so, under such circumstances misrepresentation by insured of the date of his automobile's manufacture resulting in payment by him of a larger premium than would have been payable if the year of manufacture had been correctly stated, is not material misrepresentation.[4] Motor number given in policy is merely for purpose of identification, and any warranty that might be implied therefrom is not a material warranty. Thus, where original motor block to insured truck was removed and another bearing different motor number substituted, while original was being repaired, there could be no defense to insured's right of action on ground of misrepresentation.[5] Such a change does not preclude recovery on automobile fire insurance policy. But it has been held in a Virginia case that a misrepresentation of the factory number of the automobile theft insurance was material to the risk and sufficient to avoid the policy. In its opinion the court said: "It clearly appears that the representation that the factory number was 87,382 was made and relied on by the defendant, and that it was untrue. The uncontradicted evidence is that the policy would not have been issued, had the agent known that the factory number of the car had not been correctly given. The correct factory number of the car was material to the risk when assured, for many reasons. The policy provides that it shall be void if the interest of the insured in the property be other than unconditional and sole ownership. With the correct factory number, the defendant could trace the car from the factory, and thus ascertain whether it had been theretofore stolen. If it appeared from the investiga-

3. Wyman et al. v. Security Ins. Co. of Cal., 202 Cal. Rep. 743, 262 Pac. 330; White v. Home Mut. Ins. Ass'n, 189 Iowa, 1051, 179 N. W. 315; Moore v. North River Ins. Co., 111 Kan. 420, 207 Pac. 760; Giles v. Citizens' Ins. Co. of Mo., 32 Ga. App. 207, 122 S. E. 890; Caldwell v. City of N. Y. Ins. Co. (Mo. App.), 245 S. W. 602; Douglas v. Ins. Co. of N. A., 215 Mich. 529, 184 N. W. 539; Tomato Products Co. v. Manufactures' Liability Ins. Co. of N. J., 203 App. Div. 678, 197 N. Y. S. 497.

4. Weiss v. Millers' Nat. Ins. Co. of Chicago, 199 N. Y. S. 289.

5. Wyman et al. v. Security Ins. Co. of Cal., 202 Cal. Rep. 743, 262 Pac. 330.

tion that it had been before stolen, the company would have a complete defense to the action. It clearly appears from the evidence that the rate charged for insurance on second-hand cars is higher than that charged on new cars, and that, with the correct factory number, the defendant could communicate with the manufacturers and secure the numbers of the transmission, clutch, and other component parts of the car with which to identify it and trace it through various purchasers, to ascertain whether the car was new or second-hand, and that such action and correct information is necessary to make certain of a recovery of the car, and thereby reduce the liability of the company under the contract."[6]

§ 177. Matter of description.

Generally speaking, reference in the automobile insurance policy to the motor number of the car is merely descriptive, and the giving of an erroneous number does not constitute breach of warranty and avoid the insurer's liability. The mere misstatement of the motor number does not deprive insured of the right to recover for the loss of his car as a matter of law.[7]

§ 178. Illustrations. (a) Correct number concealed without assured's knowledge.

The misdescription of a car by giving a wrong motor number, which had been placed on the car and the correct number concealed, without the owner's knowledge, was not sufficient to avoid the policy.[8]

§ 179. Illustrations. (b) Identity.

The number of the car is a mere matter of description; it is not a question as to the number of the car, but the identity of the car itself, where it has been stolen, that deter-

6. North River Ins. Co. v. Atkinson, 137 Va. 313, 119 S. E. 46 (1923).
7. Lorenz v. Bull Dog Auto. Ins. Ass'n (Mo. App.), 277 S. W. 596 (1925).
8. Giles v. Citizens' Ins. Co. of Missouri, 32 Ga. App. 207, 122 S. E. 890 (1924).

mines whether or not the assured has a right of recovery on theft insurance policy.[9] Thus, in an action on an automobile theft insurance policy insuring a Ford roadster of a certain number, the insurance company defended on the ground that the car was not the property of the plaintiff. The evidence of the defendant showed that a car of the same description and make, bearing the same factory number, was purchased from the factory long prior to the issuance of the policy, and was then in the possession of the purchaser in a distant city. The court held that the number of the car stated in the policy was merely a matter of description, and that the question was as to the particular car which the company insured and not the number.[10]

§ 180. Evidence. (a) Identity.

It was proper to admit evidence of assured that destroyed car was the only one of that make ever owned by him where his application gave correct information as to price, from whom purchased, and style of car but gave different motor number than that on destroyed car.[11]

§ 181. Evidence. (b) Identity—Defense.

The court held in an Iowa case that it was no defense that the license number of an automobile insured was incorrectly stated in the application where the automobile destroyed otherwise answered the descriptions in the application, and was the only automobile owned by the applicant.[12]

Said the court: "The number of the automobile was inserted merely for the purpose of identification. The insurance is intended to be and was for the automobile; not the number plate. It was the car insured quite as certainly, if fully identified, without resort to the number.

9. Moore v. North River Ins. Co., 111 Kan. 420, 207 Pac. 760 (1922).
10. Moore v. North River Ins. Co., 111 Kan. 420, 207 Pac. 760 (1922).
11. Lorenz v. Bull Dog Auto. Ins. Ass'n (Mo. App.), 277 S. W. 596.
12. White v. Home Mutual Ins. Ass'n of Iowa, 189 Iowa, 1051, 179 N. W. 315 (1920).

There was such identification, for the evidence, without conflict, showed that the automobile burned met the description contained in the policy in all other respects, was the only automobile owned by the insured, and was the one intended to be covered by the policy." [13]

§ 182. Evidence. (c) Examination by insurer's agent.

Where the insurer contended that the insured had misrepresented the number of the car insured under an automobile theft policy, testimony was admissible to show that at the time application for the insurance was made, the insurer's agent made examination of the car, that the motor number could not be determined, and the agent stated that they would cover the car as of a later model.[14]

§ 183. Evidence. (d) Mistake.

In an action on an automobile fire insurance policy in the state of Missouri, the insurance company defended on the ground that the car was insured by the wrong number. The evidence disclosed that it was a mistake brought about by the failure of the agent to obtain correct information. The defense was not tenable.[15]

§ 184. Jury. In general.

It is for the jury to determine, where the issue is as to misrepresentation concerning the motor number of an automobile insured under an automobile theft policy, whether the car in fact was of such an older model than that represented that the risk, the degree of hazard or liability, was increased.[16]

§ 185. Illustrations. (a) Identity.

Where application for insurance correctly states the price paid for the car, the company from which it was obtained,

13. White v. Home Mut. Ins. Ass'n of Iowa, 189 Iowa, 1051, 179 N. W. 315.
14. Whitcomb v. Auto. Ins. Co., 167 Minn. 362, 209 N. W. 27 (1926).
15. Caldwell v. City of New York Ins. Co. (Mo. App.), 245 S. W. 602 (1923).
16. Whitcomb v. Auto. Ins. Co., 167 Minn. 362, 209 N. W. 27 (1926).

the date of purchase, and the style of car, and the only error in description is the motor number of the car, it is a proper question for the jury to determine whether or not the car destroyed by fire was in fact the car insured.[17]

§ 186. Illustrations. (b) Good faith.

There was sufficient evidence to go to the jury on the question whether the assured had given the insurer a correct description of a second-hand car which he had purchased from another, where he gave as the factory number one which the seller had told him was such.[18]

§ 187. Judgment.

ATTORNEY'S FEE FOR VEXATIOUS DELAY. RETURN OF PREMIUM.

In action on auto insurance policy covering car under dealer's "open policy" where company denied liability on account of mistake in the description by number but did not tender back the premium paid by insured, judgment for attorney's fees for vexatious delay was proper.[19]

(E) PLACE OF KEEPING.

LOCATION OF INSURED AUTOMOBILE IS ESSENTIALLY MATERIAL, AS IT IS AN IMPORTANT FACTOR IN FIXING THE RATE OF PREMIUM.

§ 188. In general.

Location of the automobile may be matter material to the risk, and if so, change of location without notice to the company forfeits the insurance. Where insured warranted that he would keep his automobile in a private garage, in the rear of his residence in Columbus, Georgia, and the automobile was permanently removed to another state and was kept for a period of five or six months in a machine shop, such change of location voided the policy.[20] But

17. Lorenz v. Bull Dog Auto. Ins. Asso. (Mo. App.), 277 S. W. 596 (1925).
18. Continental Ins. Co. v. Burns, 144 Md. 429, 125 Atl. 232 (1924).
19. Vaught v. Home Ins. Co. of New York (Mo. App.), 227 S. W. 939 (1926).
20. Affleck v. Potomac Ins. Co. (R. I.), 140 A. 469, re-argument denied, 141 A. 183.

where the policy contained warranty that the insured would at all times keep the automobile in a specified garage except when it was enroute or being repaired for a period not exceeding 15 days, and there was evidence in the action on the policy to the effect that the defendant's agent was informed by insured of visits to other towns for periods exceeding 15 days and that such agent stated that the company had no objection to this and that no waiver was necessary, the provision of the policy as to location was waived in this case, as the agent here had authority to make waiver.[21] There is no misrepresentation or fraud as to location of automobiles where the managing officer of the automobile company does not read the policy before signing it, where he did not know the place that was named as the usual storage location of the insured automobiles, where he told the agent all about his stock of automobiles and where kept, paid whatever rate of premium was charged without knowing the proper rate, in representing that the cars were stored in the usual place of storage, though some of the cars were stored in a town 115 miles away.[22]

§ 189. Location material. Factor in rate making.

"Nothing is better settled than that the location of the property insured is essentially material in contracts of insurance and enters largely into the consideration of the company in fixing the rate of premium," said the court in a North Carolina case. The policy provided that in consideration of the reduced premium, the machine should at all times be kept in a private garage designated in the policy, with the privilege to operate it and house in any other building for a stated period at any one location at any one time, provided it was enroute, visiting or being cleaned or repaired. The car was taken from the private garage to another state, where it remained for about six months; it was

21. Commercial Union Assur. Co. of London v. Hill (Tex. Civ. App.), 167 S. W. 1095.

22. American Central Ins. Co. v. Buchanan-Vaughan Auto. Co. (Tex. Civ. App.), 256 S. W. 610.

then removed to a third state and was destroyed by fire while located in a shop to be painted. While the insured car was in the second state it was not enroute, visiting or being cleaned or repaired. The court considered that there was a permanent removal of the car from the place where the insured had warranted that it should be kept. There was a breach of the policy condition, and recovery was not granted.[23]

§ 190. Erroneous description.

Ordinarily, erroneous description of location of property does not avoid automobile fire and theft insurance policy, when risk is not materially affected thereby.[24] However, it has been held otherwise in an English case. The policy recited that the proposal or application should be the basis of the contract, and provided further, that "material misstatement by the insured shall render the policy void." There was a misstatement as to the usual location of the insured car. Even though the misdescription was an inadvertence on the part of the insured, and apart from the materiality of the representation, its accuracy was the basis of insurer's liability, it was held that the insurer was not liable.[25] The question, however, of reformation evidently did not arise.

§ 191. Fraud or mistake.

Insured under an automobile fire insurance policy cannot be held conclusively guilty of fraud simply because of an incorrect statement in the policy as to the place of location of the insured automobiles. And it is too late to declare policy void for mistake in stating the place where the in-

23. Lummus v. Fireman's Fund Ins. Co., 167 N. Car. 654, 83 S. E. 688 (1914), L. R. A. 1915D, 239.

24. Affleck v. Potomac Ins. Co. (R. I.), 140 Atl. 469, re-argument denied, 141 Atl. 183 (1928).

25. Dawsons Ltd. v. Bonnin, 2 A. C. (Eng.) 413 (1922), 11 B. R. C. 441, 128 L. T. N. S. 1 (1922), W. N. 236, 91 L. J. P. C. N. S. 210, 38 Times L. R. 836 (1922), W. C. Ins. Rep. 302 (1922).

sured automobiles are stored, after destruction by fire, for the insured would thereby lose the benefit of taking out other insurance.[26]

§ 192. Knowledge.

Where change of location for insured cars is necessary and made known to insured's agent, such change will not avoid policy.[27]

§ 193. Waiver.

Actual knowledge by the insurer's agent that the insured automobiles were not located at the place designated in the policy constitutes a waiver of the provision.[28]

§ 194. Illustration. Private garage construed to cover addition to barn.

In an Iowa case, the automobile in question was kept in the front end of a lean-to 16 feet wide and 26 feet long, attached to plaintiff's barn. By its side was kept a buggy, and fence or partition back of it to separate the vehicles from the stock. It was shown that the insured at the time of applying for the insurance told the agent of the insurer that the car was kept in a shed adjoining his barn. The location of the automobile, in the policy, was described as a "private garage." The court held that the place of keeping the car was a "private garage" within the meaning of that expression found in the application. The opinion of the court reads: "The application recited that the automobile was 'usually kept in a private garage.' The evidence disclosed that he kept it in a shed or lean-to on his

26. American Central Ins. Co. v. Buchanan-Vaughan Auto. Co. (Tex. Civ. App.), 256 S. W. 610; See Andrews v. Bull Dog Auto Fire Ins. Ass'n of Chicago (Mo. App.), 258 S. W. 714; Harris v. St. Paul Fire & Marine Ins. Co., 126 N. Y. S. 118.

27. Walker v. Fireman's Fund Ins. Co., 114 Ore. 545, 234 Pac. 542.

28. Liverpool & L. & G. Ins. Co. v. Georgia Auto. & Supply Co., 29 Ga. App. 334, 115 S. E. 138 (1922).

barn, and it is argued that this was not a garage. The definition of the word, found in Webster's dictionary, is 'place for housing automobiles.' The Century dictionary says it means 'a station at which motor cars can be sheltered, stored, repaired, cleaned, and made ready for use; also a place for private storage for a motor car, a stable for motor cars.' In the addenda to the Standard dictionary, it is defined as 'a building, as a stable or shed, for the storage of automobiles and other horseless vehicles.' * * * The word 'garage' was recently appropriated from the French language, there meaning keeping under cover, or a place for keeping, and, as employed in English, is accurately defined by Webster's dictionary, substantially like that of the Century dictionary, as 'a place where a motor vehicle is housed and cared for.' To be such, the place need not be apart from other buildings, though that may be the more common and appropriate way. If the 'place' be in a lean-to attached to another building, as a barn or corncrib constructed for the purpose, or, having been erected, is set apart for the housing of the automobile, it is none the less a 'garage,' within the meaning of that word in either language. In French the word has reference to the place of keeping wagons and other vehicles of transportation, as well as automobiles; but in English it appears to have been restricted to motor vehicles." [29]

§ 195. Miscellaneous. "When not in use the car shall be kept in a garage" construed.

Where a policy contains the provision that "when not in use the car shall be kept in a garage," it has been held that the court cannot as a matter of law say that the provision was violated by leaving the car standing in the street from one day's use to another." [30]

29. White v. Home Mut. Ins. Ass'n of Iowa, 189 Iowa 1051, 179 N. W. 315 (1920).

30. Christiansen v. Bankers' & Shippers' Ins. Co., 49 S. D. 225, 207 N. W. 108 (1926).

(F) USE OF INSURED AUTOMOBILE.

STATEMENT OF THE USE OF AN AUTOMOBILE, ON THE FACE OF THE POLICY, WHICH RELATES TO THE RISK, IS USUALLY A WARRANTY THE BREACH OF WHICH WILL VOID THE POLICY, BUT WORDS WHICH ARE MERELY DESCRIPTIVE ARE NOT NECESSARILY SO CONSTRUED.

EXCEPTION. TEMPORARY USE IN CARRYING PASSENGERS FOR HIRE CONTRARY TO THE PROVISIONS OF THE POLICY, IT HAS BEEN HELD, DOES NOT OPERATE TO VOID THE POLICY, BUT IT IS MERELY SUSPENDED WHILE PROVISION IS VIOLATED. ASSURED HAS RIGHT OF RECOVERY WHERE THERE WAS NO VIOLATION OF THE PROVISION AT THE TIME OF LOSS.

THIS RULE ESPECIALLY APPLIES WHERE THE INSURED CAR IS USED FOR HIRE WITHOUT THE KNOWLEDGE OR CONSENT OF THE OWNER.

§ 196. In general.

The fire and theft automobile policy generally contains a provision that the insurer shall not be liable for loss or damage to the insured automobile while it "is frequently or habitually used as a public or livery conveyance for carrying passengers for compensation, and for one week after the termination of said use."[31]

§ 197. Public policy.

Insurer, without violating any rule of public policy, can provide that the policy will be void if the insured car is used to carry passengers for hire.[32]

§ 198. Defined.

A passenger in the legal sense is one who travels in some public conveyance by virtue of an express or implied contract with the carrier, as the payment of a fare or that which is accepted as the equivalent thereof. An automobile is not used for carrying passengers within the meaning of the automobile insurance policy unless it is held out to the public as a means of conveyance. "Passengers" refers

31. Fire, Theft and Transportation Automobile policy approved by the National Convention of Insurance Commissioners, December, 1919.

32. Mittet v. Home Ins. Co., 49 S. D. 319, 207 N. W. 49 (1926).

only to those persons transported from place to place in a public conveyance for hire.[33] Even though the insured transports relatives and friends for hire, that in itself is not sufficient to breach the contract, unless it is shown that insured also held the car out for hire for use of the public.[34] In a federal case, the insured had intended to "hack" the car and had secured a hacker's license, but had thereafter changed his mind. The evidence showed that he had never offered to carry any persons for compensation, but had accepted certain moneys from persons who had voluntarily paid him. It was held that the trial court erred in directing a verdict for the insurance company.[35]

§ 199. Misrepresentation. Intent to deceive immaterial.

It is immaterial whether misrepresentation as to the use of the insured automobile is made with intent to deceive or whether the risk is increased. Thus, in a Massachusetts case, where the insured stated that the automobile was used privately and for pleasure and the policy was issued on such statement, and when in fact the insured actually used the car in his employer's business, the policy so obtained was void.[36]

§ 200. Compensation.

The receipt of compensation, though not an absolute test, is a persuasive consideration in deciding whether a use is for business or for pleasure; for example, where no compensation was received for using the car when business was combined with pleasure, the jury was justified in finding that such use as was made of the car for business purposes

33. Marks v. Home F. & M. Ins. Co. of California, 52 App. D. C. 225, 285 Fed. 959 (1923).

34. Marks v. Home F. &. M. Ins. Co. of California, 52 App. D. C. 225, 285 Fed. 959 (1923).

35. Marks v. Home F. &. M. Ins. Co. of California, 52 App. D. C. 225, 285 Fed. 959 (1923).

36. Record v. Royal Ins. Co., 253 Mass. 617, 149 N. E. 546 (1925).

was merely incidental and accompanied its use for pleasure.[37]

Where the assured represented to the insurer's agent that the car was used for pleasure and the agent added the word "only" in copying the language into the policy, there was even no breach of the policy provision because he occasionally took his employer out in his car, as he was not paid for it.[38]

§ 201. Descriptive.

Where automobile policy covered "loss arising by reason of the ownership, maintenance or use," and contained the following warranty, "None of the automobiles herein described are rented to others," it was held that the warranty referred to the use of the automobile at the date of the policy and insured did not violate the warranty because the automobile in question was rented at the time of the accident.[39]

§ 202. Promissory warranty.

Provision of fire and theft automobile insurance policy prohibiting use of insured car for carrying passengers constitutes a promissory warranty, a breach of which avoids the policy;[40] but there are decisions to the effect that the policy will only be suspended during the period of the

37. Bloom v. Ohio Farmers' Ins. Co., 255 Mass. 528, 152 N. E. 345 (1926).

38. Automobile Insurance Exchange v. Wilson, 144 Md. 249, 124 Atl. 876 (1923).

39. Mayor, Lane & Co. v. Commercial Casualty Ins. Co., 169 N. Y. App. Div. 772, 155 N. Y. S. 75 (1915).

40. Record v. Royal Insurance Co., Ltd., 253 Mass. 617, 149 N. E. 546 (1925); Elder v. Federal Ins. Co., 213 Mass. 389, 100 N. E. 655 (1913); Orient Ins. Co. v. Van Zandt-Bruce Drug Co., 50 Okla. 558, 151 Pac. 323 (1915); Western Assurance Co. v. Caplan (Can.), 2 D. L. R. 935, S. C. 257, aff'g 24 O. W. N. 66 (1924); Wood v. American Automobile Ins. Co., 109 Kan. 801, 202 Pac. 82 (1921).

breach.[41] Knowledge that insured car is to be used as a service car may constitute waiver of condition.[42]

§ 203. Illustrations.

(a) Where an automobile fire insurance policy provides that "it is warranted by the insured that the automobile hereby insured during the term of this policy, shall not be used for carrying passengers, for compensation, and that it shall not be rented or leased," such a provision constitutes a promissory warranty, and breach thereof by insured prevents recovery.[43] (b) Where loss occurred while automobile was being used under a contract of rental or lease, there could be no recovery on a policy providing that the insurer would not be liable for loss occurring while automobile was being rented under contract of lease.[44] (c) It has been held in Massachusetts that where the policy provided "that the automobile hereby insured against loss or damage by fire shall not be used for carrying passengers during the term of this policy, and in the event of the violation of this warranty, this policy shall immediately become null and void," and the evidence disclosed that with the knowledge and consent of the insured, his son had used the car for the accommodation of passengers and tourists for hire and compensation, the policy was forfeited and the insured had no right of recovery.[45] (d) An agreement between father, the owner of the insured car, and the son, that the son will not use the car to carry passengers for hire, which use is prohibited by the policy will not excuse breach of such policy condition by the son, since, under

41. Mittet v. Home Ins. Co., 49 S. D. 319, 207 N. W. 49 (1926); Brown v. International Indemnity Co., 121 Kan. 406, 247 Pac. 432 (1926).

42. Southern Casualty Co. v. Welch Motor Co. (Tex. Civ. App.), 291 S. W. 272.

43. Orient Ins. Co. v. Van Zandt-Bruce Drug Co., 50 Okla. 558, 151 Pac. 323; See Collins v. Phoenix Assur. Co., Ltd. of London (Mo. App)., 285 S. W. 783, aff'g 215 Mo. App. 683, 258 S. W. 732.

44. Brown v. Interational Indemnity Co., 121 Kan. 406, 247 Pac. 432 (1926).

45. Elder v. Federal Ins. Co., 213 Mass. 289, 100 N. E. 655 (1913).

such circumstances, the son becomes the licensee of the owner.[46]

§ 204. Temporary use suspends policy.

The provision that the insured automobile "shall not be used for carrying passengers for compensation, and that it shall not be rented or leased" has been construed to mean that the owner of the insured car will not make a business of using the car for such purposes, and would not be continually so used for any length of time.[47] The provision of the policy that the automobile "will not be rented or used for passenger service of any kind for hire" should be construed to mean something more than a single act of renting or hiring, something of a permanent nature is contemplated by the clause, and hence the single rental of the car to convey some hunters into the country, where such service had been contemplated, would not avoid recovery.[48] The provision does not mean temporary use but habitual use of the automobile for such purpose. For example, where the policy provided that the uses to which the automobile would be put were private pleasure uses and business calls, excluding "commercial delivery," occasional use of the car by the owner who was a florist for delivering flowers did not prevent recovery on the policy.[49]

The provision that the insured car "will not be rented or used for passenger service of any kind for hire" does not mean that the policy is void because the car had been used for carrying passengers for hire for one or two days. Where the car owner, who operated a garage and rented automobiles, had the car for his private use, but one day when all cars were in use, an employee without the knowledge of the insured, used the car for passenger hire, and

46. Mittet v. Home Ins. Co., 49 S. D. 319, 207 N. W. 49 (1926).

47. Commerical Union Assur. Co. of London v. Hill (Tex. Civ. App.), 167 S. W. 1095 (1914).

48. Crowell v. Maryland Motor Car Ins. Co., 169 N. C. 35, 85 S. E. 37 (1915), Ann. Cas. 1917D, 50.

49. Firemen's Ins. Co. of Newark v. Rye, 160 Ark. 212, 254 S. W. 465 (1923).

some time thereafter the insured car was destroyed by fire, there was no such breach of warranty as would void the policy or defeat the insured's right of recovery.[50]

It has been held in a South Carolina case that where an automobile fire insurance policy provided that the automobile was not to be used in public service, the policy was not forfeited because the insured automobile had been used in public service, if it was not so used at the time of its destruction by fire.[51]

In a Pennsylvania case, it was held occasional use of automobile by vice-president of corporation to deliver box of glass to workman is not use for commercial delivery within meaning of insurance policy.[52]

So it was held in a Missouri case that temporary noncompliance with the provision of the automobile insurance policy that the car will not be used for carrying passengers for hire, without the written consent of the insurer, will not operate to void the policy or forfeit the insured's rights thereunder, when the car was not being used in violation of the provision at the time of its destruction by fire.[53]

§ 205. Mortgagor and mortgagee. As their interests may appear.

Where the policy is issued to insure the interests of the mortgagor and mortgagee, as their respective interests might appear, and the insured car was mainly, if not entirely, used by the mortgagor for livery purposes contrary to the provision of the policy that the car should not be used for renting purposes or for hire, such use was a breach of warranty and there could be no recovery on the policy. The provision applied both to the interest of the mortgagor and mortgagee.[54]

50. Crowell v. Maryland Motor Car Ins. Co., 169 N. C. 35, 85 S. E. 37 (1915).
51. Graham v. Standard Fire Ins. Co., 119 S. C. 218, 112 S. E. 88 (1922).
52. Murphy & Co. v. Manufacturers' Casualty Co., 89 Pa. Super. Ct. 281 (1926).
53. Berryman v. Maryland Motor Car Co., 199 Mo. App. 503, 204 S. W. 738 (1918).
54. Marmon Chicago Co. v. Heath, 205 Ill App. 605 (1917).

§ 206. Pleading. Condition subsequent.

Condition in an automobile liability policy that it would be null and void if the insured automobile should be used for carrying passengers is a condition subsequent which constitutes a matter of defense, and it must be pleaded by the insurer to be available as a means of defeating recovery.[55]

(G) OTHER INSURANCE.

VIOLATION OF PROVISION THAT "NO RECOVERY SHALL BE HAD UNDER THIS POLICY, IF AT THE TIME A LOSS OCCURS THERE BE ANY OTHER INSURANCE COVERING SUCH LOSS, WHICH WOULD ATTACH IF THIS INSURANCE HAD NOT BEEN EFFECTED," OR WORDS TO THAT EFFECT, FORFEITS THE POLICY.

§ 207. In general.

The fire, theft and transportation policy now generally used provides that "no recovery shall be had under this policy, if at the time a loss occurs there be any other insurance covering such loss, which would attach if this insurance had not been effected."[56]

§ 208. General rule.

A violation of the "other insurance" clause of the automobile policy constitutes a breach of warranty, and avoids the policy.[57]

55. Center Garage Co. v. Columbia Ins. Co., 96 N. J. L. 456, 115 Atl. 401 (1921).

56. Fire, Theft and Transportation Automobile policy approved by the National Convention of Insurance Commissioners at their December, 1919, meeting in New York.

57. Mishiloff v. American Central Ins. Co., 102 Conn. 370, 128 Atl. 33 (1925); Dimmick v. Aetna Insurance Co., 213 Ill App. 467 (1919); Baker v. Northern Assurance Co., Ltd. of London, Eng., 214 Mich. 540, 183 N. W. 61 (1921); Clower v. Fidelity-Pheonix Fire Ins. Co., 220 Mo. App. 1112, 296 S. W. 257 (1927); Suetterlein v. Northern Insurance Co. of New York, 130 Misc. 420, 224 N. Y. S. 409 (1927); Interstate Auto. Insurance Co. v. Edens (Tex. Civ. App.), 235 S. W. 671 (1921); New Brunswick Fire Ins. Co. v. Morris Plan Bank, 136 Va. 402, 118 S. E. 236 (1923); Wyley v. Federal Insurance Co., 136 Wash. 686, 241 Pac. 292 (1926); Inland Finance Co. v. Home Ins. Co., 134 Wash. 485, 236 Pac. 73.

§ 209. Exception.

But it has been held that breach of the provision against other insurance does not render the policy void, but merely voidable.[58]

§ 210. Public policy.

A sound public policy requires the enforcement of the clause in an automobile insurance policy against other insurance.[59]

The purpose of the clause is to reduce the moral hazard. Thus, in an action on a fire policy containing such a clause, where it appeared the insured had taken out another policy in violation of the clause, and the second policy was invalid because of the existence of the first, it was held, nevertheless, that the first policy was forfeited.[60] Said the court: "The language of the clause here involved is unequivocal. To disregard it would be to ignore the contract which the parties have entered into and expressed by language which can bear but one construction. The second policy taken out by Toler here would certainly have been valid but for the existence of the policy sued on, and that being true, the policy sued on was thereby invalidated, for it expressly so provides. A sound public policy requires the enforcement of such a condition. The over-insurance of property increases the moral hazard, and its inevitable tendency is to increase the rates imposed for insurance upon those who do not over-insure their property. This is an evil against which the companies have a right to protect themselves, and in which the insuring public has a very substantial interest. This case illustrates the evil: An automobile costing, new, $2,525, worth at the time of its destruction $1,600, is insured by its owner for $4,000. If both com-

58. Pfaffengut v. Export Ins. Co. of New York, —— N. D. ——, 212 N. W. 518 (1927); Healy v. Stuyvesant Ins. Co., 72 Pa. Sup. Ct. 168 (1918).

59. New Brunswick Fire Ins. Co. v. Morris Plan Bank, 136 Va. 402, 118 S. E. 236 (1923).

60. New Brunswick Fire Ins. Co v. Morris Plan Bank, 136 Va. 402, 118 S. E. 236 (1923).

panies had remained in ignorance of this double insurance, there is no reason to doubt that the assured would have recovered twice the appraised value of the automobile." [61]

§ 211. Provision is reasonable.

Provision that the policy "shall be null and void if at the time a loss occurs there be any other insurance, covering against the risks assumed by this policy, which would attach if this insurance had not been effected," is reasonable, and a violation of its conditions will forfeit the policy.[62] For example, the insured car had been sold, and buyer took out another policy, without knowing of the existence of the one in question. After learning of the existence of the policy sued on, he paid premium on the second policy, then tried to recover on both policies. The court held the policy was void.[63]

§ 212. Clause has no application to insurable interests not covered.

The provision against other insurance can only apply to the particular interest in the property covered by the policy, and to the parties in interest therein. In other words, there may be other parties having an interest in the insured property than those mentioned in the policy or insured thereunder. If such is the case, such other parties in interest would have legal right to take out other insurance to cover their interests regardless of the provision. For example, the mortgagor and mortgagee have separate and distinct insurable interests. Each has a legal right to insure his interest against loss, without being restrained because of the policy contract of the other.[64] Even though the auto-

61. New Brunswick Fire Ins. Co. v. Morris Plan Bank, 136 Va. 402, 118 S. E. 236 (1923).

62. Interstate Auto. Ins. Co. v. Edens (Tex. Civ. App.), 235 S. W. 671 (1922).

63. Interstate Auto. Ins. Co. v. Edens (Tex. Civ. App.), 235 S. W. 671 (1922).

64. Dimmick v. Illinois Auto. Fire Ins. Exchange, 216 Ill. App. 543 (1920);

mobile is insured at its full value, by the one, if in ignorance of the other's insurance, it will not constitute a breach of warranty against "other insurance" by either.[65] But it has been held that in such a case the policy will be avoided to the extent of the other insurable interest therein.[66]

§ 213. Illustrations. (a) Conditional sales contract (1) Master policy—Knowledge.

Under a conditional sales contract of purchase the seller took out a policy of fire insurance for the buyer, with loss payable to the seller. Thereafter the contract was assigned by the seller to a commercial credit company, which company then insured the car under a master policy. The first policy provided that it would be void if other insurance was taken out covering the loss, which "would attach if this insurance had not been in effect." The court held, in an action on the first policy by the buyer that the insurer was liable, for the second policy was taken out without the knowledge of the buyer and covered only the insurable interest of the credit company.[67]

§ 214. Illustrations. (b) Same (2) Buyer's interest voided.

The seller of an automobile on a conditional sales contract procured a policy of insurance for the protection of the buyer's interest, as well as his own, which contained

Harvey v. Pawtucket Mut. Fire Ins. Co., 250 Mass. 164, 145 N. E. 35 (1924); Clower v. Fidelity-Phoenix Fire Ins. Co., 220 Mo. App. 1112, 296 S. W. 257 (1927); DeShields v. Insurance Co. of North America, 125 S. C. 457, 118 S. E. 817 (1923); Thompson v. National Fire Ins. Co., 48 S. D. 224, 203 N. W. 464 (1925).

65. Investors' Mortgage Co. v. Marine & Motor Ins., 155 La. 627, 99 So. 486; Harvey v. Pawtucket Mut. F. Ins. Co., 250 Mass. 164, 145 N. E. 35 (1924); Baker v. Northern Assur. Co., Ltd. of London, Eng., 214 Mich. 540, 183 N. W. 61 (1921); DeShields v. Insurance Co. of North America, 125 S. C. 457, 118 S. E. 817 (1923).

66. Baker v. Northern Assur. Co. of London, Eng., 214 Mich 540, 183 N. W. 61 (1921).

67. DeShields v. Insurance Co., of North America, 125 S. C. 457, 118 S. E. 817 (1923).

the usual clause against other insurance. The buyer, in ignorance of the fact, insured his interest alone. The court held that the buyer's interest under the first policy was voided.[68]

§ 215. Mortgagee.

Where the insurance policy carries a loss payable clause endorsement which provides that payment of any loss shall be made to the mortgagee as his interests may appear, the mortgagee's right of recovery is identical with that of the mortgagor or owner.[69] Thus, where the mortgagor or owner breaches the condition of the policy against other insurance, his act will also preclude the mortgagee from recovering.[70]

§ 216. Waiver.

The provision against other insurance may be waived.[71] For example, in a case where the policy condition against other insurance had been breached, and the insurance company entered upon an adjustment of the loss with assured's trustee in bankruptcy, knowing that the assured had procured another policy on the same property, causing the trustee trouble and expense, it was held that the company had waived the clause.[72] But the general agent's clerk, who had authority to fill out insurance policies and who at times issued policies, signing the name of the president or the general agent, with their approval, had no authority to

68. Baker v. Northern Assurance Co., Ltd. of London, Eng., 214 Mich. 540, 183 N. W. 61 (1921).

69. Inland Finance Co. v. Home Ins. Co., 134 Wash. 485, 236 Pac. 73; See Investors' Mortgage Co. v. Marine & Motor Ins. Co. of America, 155 La. 627, 99 So. 486. See Sunderlin on Fire Insurance, Chapter X, Mortgagee Interests.

70. Wyley v. Federal Insurance Co., 136 Wash. 686, 241 Pac. 292 (1926);

71. Royal Insurance Co. v. Eggleston, 19 Ala. App. 638, 99 So. 828 (1924); Wallus v. Insurance Co. of North America, 230 Ill. App. 305 (1923); South v. Philadelphia Fire & Marine Ins. Co., 217 Ky. 612, 290 S. W. 493 (1927); Pfaffengut v. Export Ins. Co. of New York, —— N. D. ——, 212 N. W. 518 (1927); Lindreth v. National Fire Ins. Co., —— N. D. ——, 213 N. W. 961 (1927).

72. Royal Insurance Co. v. Eggleston, 19 Ala. App. 638, 99 So. 828 (1924).

bind the company to waive breach of the condition against other insurance by notice of forfeiture.[73]

The clause is not waived because assured notified the company's agent that he intended to take out additional insurance.[74] Advising the assured to make proof of loss, which he did, was not a waiver of the clause.[75] Paying to a finance company, which was assignee of seller's conditional sale contract of purchase, the amount owing, it has been held, does not constitute a waiver of the provision.[76]

Prohibition against other insurance was not waived by reason of insurer's knowledge a few days before fire that other insurance had been placed on the car and its failure to object.[77]

73. Royal Insurance Co. v. Eggleston, 19 Ala. App. 638, 99 So. 828 (1924).
74. Boyle v. United States Fire Ins. Co. (Mo. App.), 250 S. W. 641 (1923).
75. Bank of South Jacksonville v. Hartford Fire Ins. Co., 1 Fed. (2nd) 43 (1924).
76. Suetterlein v. Northern Ins. Co. of New York, 130 Misc. 420, 224 N. Y. S. 409 (1927).
77. Wyley v. Federal Insurance Co., 136 Wash. 686, 241 Pac. 292 (1926).

CHAPTER VIII.

TITLE AND OWNERSHIP.

SECTION.

217. In general.
218. Encumbrances. In general.
219. (a) Theft policy.
220. (b) Additional mortgage.
221. (c) No inquiry by agent as to encumbrance.
222. (d) Notice.
223. (e) Void chattel mortgage.
224. (f) Encumbered after issuance of policy.
225. (g) Trust deed satisfied before loss.
226. (h) Statutory enactment. (h1) Prevails over policy provision.
227. (h2) Right to defend.
228. (i) Promissory note for part of purchase price.
229. (j) Mortgage paid but not satisfied of record.
230. (k) Verbal agreement.
231. Forfeiture.
232. Change of interest, title or possession. (a) Reasonable and valid.
233. (b) Definition.
234. (c) What constitutes.
235. (d) Exchange.
236. (e) Decree of court.
237. (f) Statutory enactment.
238. Unconditional and sole owner. (a) Conditional sale purchaser.
239. (a1) Theft insurance.
240. (a2) When agreed to by insurer.
241. (a3) Dealer's agent.
242. (a4) Lease.
243. (b) Joint ownership for an intervening period.
244. (c) Husband and wife.
245. (d) Bill of sale—Delivery.
246. (e) "As their interests may appear".
247. (f) Statutes.
248. (g) Registration.
249. (h) Stolen car insured.
250. Waiver—Knowledge.
251. (a) Conditional sales contract.
252. (b) Joint ownership.
253. (c) Adjuster.
254. (d) Joint interests.
255. (e) Other interests.
256. (f) Return of premium.
257. (g) Request for payment.
258. Estoppel. (a) General rule.

SECTION.
259. (b) Knowledge of intention to encumber.
260. (c) Change of ownership.
261. (d) Inquiry.
262. Pleading.
263. Burden of proof. (a) Waiver.
264. (b) Chattel mortgage.
265. (c) Title.
266. (d) Purchase money notes.
267. Evidence. (a) Parol.
268. (a1) Contract of sale unsigned by seller.
269. (b) Proof of misrepresentation.
270. (c) Sufficiency.
271. (d) Ownership.
272. (e) Encumbrance—Knowledge.
273. (f) Finding.
274. Defense. (a) Agency.
275. (b) Statutory provision.
276. Instructions. (a) Unconditional ownership.
277. (b) Failure to call witness.
278. Jury. (a) In general.
279. (b) Conflict in evidence.
280. (c) Statute.
281. (d) Mortgage.
282. (e) Certificate as evidence of ownership.

PROVISIONS OF AUTOMOBILE INSURANCE POLICIES THAT THE ASSURED SHALL BE UNCONDITIONAL AND SOLE OWNER OF THE INSURED PROPERTY AND AGAINST ENCUMBRANCE ARE REASONABLE AND VALID.

BREACH OF SUCH CONDITIONS AVOIDS THE POLICY.

§ 217. In general.

The fire and theft automobile insurance policy usually provides that the entire policy shall be void, unless otherwise provided by agreement in writing added thereto, if the interest of the assured in the subject of the insurance be other than unconditional and sole ownership, and that the insurer shall not be liable for loss or damage to the insured property while encumbered by any lien or mortgage. A breach of such conditions avoids the policy.[1]

1. Kinneberg v. Fireman's Ins. Co., 65 Cal. App. 107, 223 Pac. 81 (1924); Bennett v. Northwestern Nat. Ins. Co., 58 Cal. App. 800, 257 Pac. 586 (1927); Wyman et al. v. Security Ins. Co. of Cal., 202 Cal. Rep. 743; 262 Pac. 330 (1927); Mishiloff v. American Central Ins. Co., 102 Conn. 370, 128 Atl. 33

§ 218. Encumbrances. In general.

The provision of the automobile insurance policy against encumbrance is legal and valid, in the absence of statutory enactment to the contrary, and a breach of this condition of the policy voids the policy and defeats the assured of any right of recovery.[2]

Where insured warranted that the insured property was unencumbered when in fact it was mortgaged, the policy was rendered void and there could be no recovery thereon.[3] Under such circumstances, the company was justified in acting on the statement of the insured, without making an inde-

(1925); Springfield F. &. M. Ins. Co. v. Chandlee, 42 App. Cas. D. C. 209 (1913); Conyers v. Yorkshire Ins. Co., 30 Ga. App. 6, 117 S. E. 102 (1923); United Auto. Ins. Ass'n of Indianapolis v. Henderson, 81 Ind. App. 231, 139 N. E. 680 (1924); Rupert Nat. Bank v. Insurance Co. of N. A., 40 Idaho 530, 234 Pac. 465 (1925); Beckley v. Nat. Ins. Co., 194 Iowa 1106, 190 N. W. 954 (1923); Ledvinka v. Home Ins. Co. of New York, 139 Md. 434, 115 Atl. 596 (1921), 19 A. L. R. 167; Harvey v. Pawtucket Mut. Fire Ins. Co., 250 Mass. 164, 145 N. E. 35 (1924); Schloss v. Importers' & Exporters' Ins. Co., 83 Pa. Super. Ct. 426; Cory v. International Indemnity Co., 124 Kan. 677, 261 Pac. 573; Penta v. Home Fire & Marine Ins. Co. of California, —— Mass. ——, 160 N. E. 807 (1929); Hubbard v. Ohio Farmers' Ins. Co. of Le Roy, Ohio, 224 App. Div. 249, 229 N. Y. S. 678; Ballard v. Globe & Rutgers Fire Ins. Co. of N. Y., 237 Mass. 34, 129 N. E. 290 (1921); Cottingham v. Maryland Motor Car Ins. Co., 168 N. C. 259, 84 S. E. 274, L. R. A. 1915D, 344, Ann. Cas. 1917B, 1237; International Indemnity Co. v. Duncan (Tex. Civ. App.), 254 S. W. 233 (1923); Cranston v. California Ins. Co., 94 Or. 369, 185 Pac. 292 (1919); Globe & Rutgers Fire Ins. Co. v. Smyly, 155 Ga. 547, 117 S. E. 819 (1923); Buck v. Stuyvesant Ins. Co., 209 Mo. App. 302, 237 S. W. 840 (1922); Stoddart v. National Liberty Ins. Co. of America (Mo. App.), 251 S. W. 398 (1923); Day v. National Fire Ins. Co., 216 Mo. App. 279, 264 S. W. 467; Continental Ins. Co. v. Michaels (Tex. Civ. App.), 13 S. W. (2d) 465 (1929).

2. Springfield F. & M. Ins. Co. v. Chandlee, 41 App. Cas. D. C. 209 (1913); Rupert Nat. Bank v. Insurance Co. of N. A., 40 Idaho 530, 234 Pac. 465 (1925); Union Assur. Soc., Ltd. of London v. Renner (Ind. App.), 156 N. E. 833 (1927); Beckley v. Nat. Ins. Co., 194 Iowa 1106, 190 N. W. 954 (1923); Cottingham v. Maryland Motor Car Ins. Co., 168 N. C. 259, 84 S. E. 274, L. R. A. 1915D, 344, Ann. Cas. 1917B, 1237; Harvey v. Pawtucket Mut. Fire Ins. Co., 250 Mass. 164, 145 N. E. 35 (1924); Inland Finance Co. v. Home Ins. Co., 134 Wash. 485, 236 Pac. 73 (1925); Interstate Fire Ins. Co. v. Sorrells (Tex. Civ. App.), 295 S. W. 242 (1927); International Indemnity Co. v. Duncan (Tex. Civ. App.), 254 S. W. 233 (1923); Hartford Fire Ins. Co. v. Owens (Tex. Civ. App.), 272 S. W. 611 (1925).

3. Globe & Rutgers Fire Ins. Co. v. Smyly, 155 Ga. 547, 117 S. E. 819 (1923).

pendent investigation.[4] But it has been held that warranty in an automobile insurance policy that the machine was fully paid for and not mortgaged is of no effect unless assured intentionally and fraudulently represented and stated to the company that the automobile was not mortgaged or concealed the fact of the mortgage from the insurance company.[5] So, uncontradicted testimony of insured in an action on an automobile insurance policy that he was not asked if the car was not mortgaged, that he did not say it was not mortgaged, that he did not read the policy until after the loss occurred and did not know it warranted against encumbrances, justified the jury in finding that the assured did not fraudulently and intentionally conceal the fact that his automobile was mortgaged.[6] An untrue warranty in an automobile insurance policy that the insured automobile is fully paid for, and is not mortgaged or otherwise encumbered, will not preclude recovery where the warranty is made by the agent issuing the policy on his own responsibility and where insured makes no written application for the insurance, and does not represent to the agent that there is no encumbrance on the automobile.[7] Policy is not void though insured fraudulently states that mortgage on the car has been paid, where the policy contains clause making proceeds payable to mortgagee as his interest may appear, and insurer does not issue policy in reliance on such representations by insured.[8] The mere failure of insured to accurately describe the manner in which one holds claim against the property does not constitute a breach of warranty, it being sufficient that the insurance company is appraised that the property is encumbered, who holds the encumbrance and the nature of the claim.[9] The warranty clause in the automobile insurance policy that

4. Jeffords v. Tokio Marine & Fire Ins. Co., 123 S. C. 467, 117 S. E. 79.
5. Davidson v. American Central Ins. Co., 80 N. H. 552, 119 Atl. 707.
6. Davidson v. American Central Ins. Co., 80 N. H. 552, 119 Atl. 707.
7. Collum v. Nat. Fire Ins. Co., 181 Wis. 425, 195 N. W. 333.
8. Reese v. Standard Auto. Ins. Ass'n, 83 Ind. App. 500, 149 N. E. 137.
9. Zabarsky v. Employers' F. Ins. Co., 97 Vt. 377, 123 Atl. 520.

the insured car is not mortgaged or otherwise encumbered "except as follows" is not to be treated as a declaration of fact by insured since the position of the clause in the policy and the blank space after it shows that it was in the form of a question.[10] If policy of theft insurance covers automobile rider showing car is mortgaged to firm from which insured is purchasing it, is attached by insurance agent, there is no breach of warranty that car is fully paid for.[11]

§ 219. Encumbrances. (a) Theft policy.

In automobile theft insurance cases it has been held that the provision that the policy shall be void if the assured's interest is other than unconditional and sole ownership, is not unreasonable;[12] and that the provision, unless otherwise provided by agreement in writing, the insured shall not be liable for loss or damage while the automobile is encumbered by any lien or mortgage, is valid and enforceable.[13]

§ 220. Encumbrances. (b) Additional mortgage.

Automobile theft policy which clearly provides that it will become wholly void if additional encumbrance is placed on insured property without insurer's written consent, is void on insured's breach of such condition, by placing additional mortgage on the automobile, without insurer's knowledge or consent.[14]

§ 221. Encumbrances. (c) No inquiry by agent as to encumbrance.

Under a policy of automobile fire insurance which provides that "the automobile * * * is not mortgaged or otherwise encumbered, except as follows," and the agent,

10. Simpionbato v. Royal Ins. Co., 253 Mass. 606, 149 N. E. 666.
11. Sawyer v. Nat. Fire Ins. Co., —— S. D. ——, 220 N. W. 503 (1929).
12. Mishiloff v. American Central Ins. Co., 102 Conn. 370, 128 Atl. 33 (1925).
13. International Indemnity Co. v. Duncan (Tex. Civ. App.), 254 S. W. 233 (1923).
14. Interstate Fire Ins. Co. v. Sorrells (Tex. Civ. App.), 295 S. W. 242.

without inquiry of the insured, wrote into the policy the words "No exceptions" immediately thereafter, where the insured made no statement to the agent that the car was not encumbered and did not read the policy, recovery was allowed.[15]

§ 222. Encumbrances. (d) Notice.

The rule is that the policy is void as to additional encumbrances, where it contains the sole and unconditional ownership provision, even though the insured does not see the policy and has no knowledge of the provision at the time of giving the mortgage, where an investment company takes out the policy, as the agent of the insured, who is purchasing the car, and this is true even though the investment company takes out the policy primarily for its own protection as owner of purchase-money notes. Registration is not binding notice to insurer that the policy is given in violation of the provisions of insured's theft policy.[16]

§ 223. Encumbrances. (e) Void chattel mortgage.

Where the insurer denies liability on an automobile theft insurance policy on the ground that the insured mortgaged the automobile in violation of the policy provision against encumbrances, such a defense was not tenable where the automobile was exempt property by statute, and the policy was void because it did not contain the wife's signature.[17]

§ 224. Encumbrances. (f) Encumbered after issuance of policy.

There is a breach of the warranty against encumbrance where the insured who had but partially paid for the insured car and had given his promissory note for the balance payable, after the issuance of the policy, gave to his vendor a conditional contract of sale extending the time of payment of the obligation, and the instrument was recorded.[18]

15. Collum v. National F. Ins. Co., 181 Wis. 425, 195 N. W. 533 (1923).
16. Interstate Fire Ins. Co. v. Sorrells (Tex. Civ. App.), 295 S. W. 242.
17. Beckley v. Nat. Fire Ins. Co., 194 Iowa, 1106, 190 N. W. 954 (1923).
18. Springfield F. &. M. Ins. Co. v. Chandlee, 41 App. Cas. D. C. 209 (1913).

§ 225. Encumbrances. (g) Trust deed satisfied before loss.

But if the insured automobile is temporarily assigned under a deed of trust, which is *bona fide,* and is satisfied and canceled before loss, recovery will not be denied on the ground that the warranty against encumbrance was breached.[19]

§ 226. Encumbrances. (h) Statutory enactment. (h1) prevails over policy provision.

Texas statute prohibits any defense to fire insurance policy on the ground that the property insured was encumbered at the time of issuance of policy, or at any time thereafter. It has been construed to apply to automobile fire insurance contracts. Provision that the insurer will not be liable for loss or damage to property while encumbered by any lien or mortgage is provision for forfeiture and void.[20]

§ 227. Encumbrances. (h) Statutory enactment. (h2) Right to defend.

In construing a Nebraska statute, the court held that the statute did not preclude an insurance company from defending an action on an automobile theft policy on the ground that fraudulent representations, consisting of a statement that the insured car was fully paid for, were made by the insured in his application, where such representations related to material matters to the risk, and where, if a true answer had been made, no contract of insurance would have been entered into. It was also held that in such case the right to such a defense is not defeated by a showing that the false statement did not contribute to the loss.[21]

19. Cottingham v. Maryland Motor Car Ins. Co., 168 N. C. 259, 84 S. E. 274, L. R. A. 1915D, 344, Ann. Cas. 1917B, 1237.

20. Hartford Fire Ins. Co. v. Owens (Tex. Civ. App.), 272 S. W. 611 (1925).

21. Goodell v. Union Auto. Ins. Co., 111 Neb. 228, 196 N. W. 112, (1923).

§ 228. Encumbrances. (i) Promissory note for part of purchase price.

Where the assured gives his promissory note for part of the purchase price of an automobile, it does not constitute breach of sole and unconditional ownership provision if the car is mortgaged or encumbered.[22]

§ 229. Encumbrances. (j) Mortgage paid but not satisfied of record.

The provision of the automobile insurance policy against encumbrance is not breached where the mortgage is paid, but not satisfied of record at the time the policy is issued. Policy is valid, nevertheless.[23]

§ 230. Encumbrances. (k) Verbal agreement.

Even though the policy provides that it shall be void "if the interest of the assured in the subject of this insurance be other than unconditional or sole ownership," truck owner was not precluded from recovering on a fire insurance policy merely by reason of verbal agreement, prior to issuance of policy, to sell truck to another reserving title in himself, but delivering possession.[24]

§ 231. Forfeiture.

In absence of contrary statutory provisions, conditions in automobile insurance policies forbidding encumbrances and declaring forfeitures in case of breach are valid.[25] An automobile theft policy conditioned on insured's "unconditional and sole ownership" is void where insured purchased the automobile under sales contract whereby the seller had retained title until full payment should be made,

22. Western Assur. Co. v. Caplan (Can.), S. C. R. 227, 2 D. L. R. 935 (1924), aff'g 24 O. W. N. 66.

23. Walker v. Fireman's Fund Insurance Co., 114 Ore. 545, 234 Pac. 542 (1925).

24. Wyman et al. v. Security Ins. Co. of Cal., 202 Cal. Rep. 743, 262 Pac. 330 (1927).

25. Interstate Fire Ins. Co. v. Sorrells (Tex. Civ. App.), 295 S. W. 242.

and which had not been done.[26] Where insured automobile dealer sold and delivered an insured car to one who drove it to another state without the knowledge or consent of insurer, and it was there destroyed by fire, the insurer was not liable for the loss, under forfeiture provision for change of interest, title or possession.[27] Where fire insurance policy covering automobile, in consideration of the premium, made it condition of the policy that a fire extinguisher would be kept on the automobile insured and fire destroyed the automobile when no extinguisher was on it due to the extinguisher having been exhausted at a previous fire, and the insured had been unable to get it recharged, there was a breach of a promissory warranty which avoided the policy.[28] So under a statute that "a statement in a policy, of a matter relating to the person or thing insured, or to the risk, as a fact, is an express warranty thereof"[29] it is clear that to describe an automobile in a valued policy as having been made in 1909, when in fact it was made in 1907, is such a material misdescription of the thing insured as to constitute a breach of the express warranty.[30] But it has been held in a Georgia case that policy of insurance containing condition against encumbering the insured automobile is not forfeited by renewal or retention of title note, where such renewal note is for less amount than the original, is signed by the same party and does not increase the risk.[31] The New York court has held that in view of the rule that the language of an insurance policy must be construed against the insurance company, a representation in an automobile policy, that the automobile was fully paid for, was not necessarily false because insured gave a promissory

26. Ledvinka v. Home Ins. Co. of New York, 139 Md. 434, 115 Atl. 596, 19 A. L. R. 167.

27. Cranston et al. v. Calif. Ins. Co., 94 Ore. 369, 185 Pac. 292.

28. Union Marine Ins. Co. v. High, 153 Ark. 156, 239 S. W. 741.

29. Cal. Civil Code, sec. 2607.

30. Solomon v. Fed. Ins. Co., 176 Cal. 133, 167 Pac. 859.

31. Grantham v. Royal Ins. Co., 34 Ga. 415, 130 S. E. 589.

note for part of the purchase price, since "pay" means to satisfy by other means than cash, as well as cash.[32]

§ 232. Change of interest, title or possession. (a) Reasonable. and valid.

PROVISION THAT ANY CHANGE OTHER THAN BY THE DEATH OF THE ASSURED IN THE INTEREST, TITLE, OR POSSESSION OF THE SUBJECT OF INSURANCE VOIDS THE POLICY, IS REASONABLE AND VALID.

A BREACH OF THE CONDITION AVOIDS THE POLICY.

Provision in an automobile fire insurance policy that it would be void if any change other than by the death of an assured take place in the interest, title, or possession of the subject of the insurance," is reasonable and valid, and in case the property is encumbered, the insurer has a right to insist that its liability be terminated.[33]

§ 233. Change of interest, title or possession. (b) Definition.

The condition in the policy against alienation refers only to such a sale or disposition of the property as causes all interest of the insured in, or control over, the property to cease. So it has been held that "a mere physical change of possession, without a transfer of title or interest, is not such change of possession as will defeat the policy."[34]

§ 234. Change of interest, title or possession. (c) What constitutes.

Warranty against change of interest, title or possession is breached and the policy forfeited where the insured enters into a contract for the sale of the car, parts with its possession, and the buyer takes the car to another state where it is destroyed by fire.[35]

32. Vollmer v. Auto. Fire Ins. Co., 207 App. Div. 671, 202 N. Y. S. 274 (1923).

33. Springfield F. & M. Ins. Co. v. Chandlee, 41 App. Cas. D. C. 209 (1913); Continental Ins. Co. v. Michaels (Tex. Civ. App.), 13 S. W. (2d) 465 (1929).

34. Osmond Barringer Co. v. Standard Fire Ins. Co., 188 N. C. 117, 123 S. E. 305 (1924).

35. Cranston v. California Ins. Co., 94 Or. 369, 185 Pac. 292 (1919).

In a Texas case, the policy contained provision against change of interest, title or possession. The insured agreed to sell the insured car, and the insured accepted the purchaser's promissory note as evidence of the obligation and held the policy as security. Later the insured received some cash and took mortgage on land to secure the balance of the obligation, and returned the note. However, he continued to hold the policy as security. The court found there was a breach of warranty, and the policy was void.[36] But, where after the insurance on the car was written, without the knowledge or consent of the insurer, the assured entered into a conditional sale contract to sell it, delivered possession to the purchaser, the contract was thereafter canceled and the car restored to the insured and insured's mortgagee before the fire loss, the insurer could not thereafter declare a forfeiture of the policy because of such conditional sale.[37]

§ 235. Change of interest, title or possession. (d) Exchange.

It has been held in a Texas case that the fact that buyer had right under agreement with agent to exchange automobile purchased for another did not, until such exchange was effected, make the automobile purchased any less the buyer's property than it would have been had he had no such right, in construing provision of policy which avoided it if there was a change in interest.[38]

§ 236. Change of interest, title or possession. (e) Decree of court.

Under the clause of the policy against transfer or termination of the insured's interest in the insured property, the

36. Hamilton v. Fireman's Fund Ins. Co. (Tex. Civ. App.), 177 S. W. 173 (1915).

37. Anderson v. United States Fire Ins. Co., —— N.D. ——, 222 N. W. 609 (1929).

38. Continental Ins. Co. v. Michaels (Tex. Civ. App.), 13 S. W. (2d) 465 (1929).

policy was held to have been avoided, even though such transfer was by decree of court in a divorce proceeding.[39]

§ 237. Change of interest, title or possession. (f) Statutory enactment.

The policy being subject to statutory enactments, it has been held in Ontario, Canada, that provisions of an insurance policy to the effect that the policy shall cease to operate in the event of a lien being placed upon the car, or by reason of an assignment of the insured's interest in the policy without the written consent of the insurer, are ineffective and not binding on the insured.[40]

§ 238. Unconditional and sole owner. (a) Conditional sale purchaser.

THE RULE IS, BY WEIGHT OF AUTHORITY, THAT AN ASSURED WHO PURCHASES THE INSURED CAR ON A CONDITIONAL SALES CONTRACT IS NOT UNCONDITIONAL AND SOLE OWNER, WITHIN THE MEANING OF THE POLICY PROVISION.

Generally, when subject matter of insurance is personal property and buyer is in possession under conditional contract of sale, title to remain in seller until conditions are performed, buyer is not sole and unconditional owner. Thus, it has been generally held in automobile insurance cases that the assured who is a purchaser of the insured automobile under a conditional sale contract reserving title in the vendor, is not the unconditional and sole owner of the car within the meaning of the policy provision.[41]

39. Coffin v. Northwestern Mut. Fire Ass'n, 43 Idaho 1, 249 Pac. 89.

40. Rockmaker v. Motor Union Ins. Co., 52 Ont. L. Rep. 557, 70 D. L. R. 360, aff'g 52 Ont. L. Rep. 553, 69 D. L. R. 177 (1922).

41. Bennett v. Northwestern Nat. Ins. Co., 53 Cal. App. 800, 257 Pac. 586 (1927); Springfield F. & M. Ins. Co. v. Chandlee, 41 App. Cas. D. C. 209 (1913); Mishiloff v. American Cont. Ins. Co., 102 Conn. 370, 128 Atl. 33, (1924); Alliance Ins. Co. v. Williamson, 36 Ga. App. 497, 137 S. E. 277, (1924); Conyers v. Yorkshire Ins. Co., 30 Ga. App. 6, 117 S. E. 102 (1923); Ledvinka v. Home Ins. Co. of New York, 139 Md. 434, 115 Atl. 596 (1921); Ballard v. Globe & Rutgers Fire Ins. Co. of N. Y., 237 Mass. 34, 129 N. E. 290 (1921); Penta v. Home Fire & Marine Ins. Co. of Cal. (Mass.), 160 N. E.

But it has been held that the condition as to unconditional and sole ownership is satisfied where one having an equitable interest in the insured car is in actual possession thereof.[42]

§ 239. Unconditional and sole owner. (a) Conditional sale purchaser. (a1) Theft insurance.

The insured who purchases an automobile under a conditional sale contract, has no right of recovery in the event the car is stolen where the policy contains the provision that it shall be null and void if the interest of the insured is other than unconditional and sole ownership.[43] Even though a statute in the state of Massachusetts provides that no misrepresentation or warranty made in the negotiation of an insurance contract should be deemed material or avoid the policy, or prevent its attaching, unless such misrepresentation or warranty was made with actual intent to deceive, or the matter misrepresented increased the risk of loss,[44] the court ruled that the statute was not applicable when a condition precedent to the policy becoming effective was not performed, and held that under a conditional sale contract there was not a compliance with the policy provision. In another Massachusetts case, where the policy contained the unconditional and sole ownership clause, the court held that when title remained in the company from which assured purchased the insured automobile, the policy never attached.[45]

807; Harvey v. Pawtucket Mut. Fire Ins. Co., 250 Mass. 164, 145 N. E. 35 (1924).

42. Pacific States Fire Ins. Co. v. C. Rowan Motor Co., 122 Or. 665, 260 Pac. 441.

43. Conyers v. Yorkshire Ins. Co., 30 Ga. App. 6, 117 S. E. 102 (1923); Ledvinka v. Home Ins. Co., 139 Md. 434, 115 Atl. 596. 19 A. L. R. 167; Ballard v. Globe & Rutgers Fire Ins. Co. of N. Y., 237 Mass. 34, 129 N. E. 290 (1921).

44. Mass. Stat. 1907, Chap. 576, 21; Ballard v. Globe & Rutgers Fire Ins. Co. of N. Y., 237 Mass. 34, 129 N. E. 290 (1921).

45. Penta v. Home Fire & Marine Ins. Co. of Calif., —— Mass. ——, 160 N. E. 807 (1929).

§ 240. Unconditional and sole owner. (a) Conditional sale purchaser. (a2) When agreed to by insurer.

In a South Carolina case, the fire insurance policy provided that "unless otherwise provided by agreement in writing added hereto, this company shall not be liable for loss or damage to any property insured hereunder while encumbered by a lien or mortgage," and also contained the provision that any loss or damage payable thereunder should be paid to the vendor under a conditional sales contract, it was held that construing the two provisions together, the insurer had agreed in writing to insure the property even though it was encumbered.[46]

§ 241. Unconditional and sole owner. (a) Conditional sale purchaser. (a3) Dealer's agent.

It cannot be said that the insured was not sole and unconditional owner of the insured automobile within the terms of the policy because a dealer's agent held conditional sales contract and note, where it was not found that the dealer was the owner of the car and had sold it to insured under the conditional sales contract reserving title to himself.[47]

§ 242. Unconditional and sole owner. (a) Conditional sale purchaser. (a4) Lease.

Where the assured had but a lease agreement for the purchase of the automobile at the time the policy of insurance was issued containing "unconditional and sole ownership" clause, the policy was void from its very inception, and did not become effective by reason of the completion of rent payments before the car was stolen.[48]

46. DeShields v. Ins. Co. of N. A., 125 S. C. 457, 118 S. E. 817 (1923).

47. United Auto. Ins. Ass'n of Indianapolis v. Henderson, 81 Ind. App. 231, 139 N. E. 680 (1924).

48. Schloss v. Importers' and Exporters' Ins. Co., 83 Pa. Super. Ct. 426 (1924); Goldberg v. Knickerbocker Ins. Co., 82 Pa. Super. Ct. 302 (1924).

§ 243. Unconditional and sole owner. (b) Joint ownership for an intervening period.

Joint ownership in an automobile for an intervening period between the date of the issuance of the policy and the loss will not constitute breach of warranty of the sole and unconditional ownership clause of the policy, where the insured was in fact the original owner of the automobile insured against theft, and in full control of the car at the time of the policy's inception and continuously up to the time the car was stolen.[49]

§ 244. Unconditional and sole owner. (c) Husband and wife.

Even though the insured and his wife make payments from a common fund on an automobile insured against fire, where the car stands in his name and the wife recognizes the car as the property of the husband, he is sole and unconditional owner within the meaning of the policy clause.[50]

§ 245. Unconditional and sole owner. (d) Bill of sale—Delivery.

Sole and unconditional ownership clause of the policy was not violated where the insured signed two copies of a bill of sale of the insured automobile with the intention of delivering one to a creditor, but never did so. Finding of trial court was sustained that insured never lost control of the bill of sale, that it was never delivered to and accepted by the creditor, and that no lien on the car was thereby created.[51]

§ 246. Unconditional and sole owner. (e) "As their interests may appear" satisfies policy provision.

In the insurance business generally when there are several interests sought to be covered by the policy, it is cus-

49. Automobile Ins. Exchange v. Wilson, 144 Md. Rep. 249, 124 Atl. 876 (1924).

50. Suetterlein v. Northern Ins. Co. of N. Y., 130 Misc. 420, 224 N. Y. S. 409 (1927).

51. Kinneberg v. Firemen's Ins. Co., 65 Cal. App. 107, 223 Pac. 81 (1924).

tomary to use words "as their interests may appear" so that the policy will insure as many parties as have an interest in the thing to be insured. On the face of such an automobile theft insurance policy, it is evident that none of the insured has an "unconditional and sole ownership" in the car, and the use of the words "as their interests may appear" are equivalent to an endorsement on the policy that the interests insured are not those of a sole and absolute owner. It has been held that it is not essential, where such words are used, to describe the exact nature of the interests covered. The words themselves are sufficiently descriptive of the interest of the conditional vendee and also of the conditional vendor to satisfy the terms of the policy.[52]

§ 247. Unconditional and sole owner. (f) Statutes.

UNCONDITIONAL AND SOLE OWNERSHIP CLAUSE OF POLICY AND PROVISION AGAINST ENCUMBRANCE MAY BE NULLIFIED BY STATUTE; FOR STATUTORY ENACTMENT PREVAILS OVER POLICY PROVISIONS.

In the absence of statute, a stipulation in an automobile theft policy that, unless otherwise provided by agreement in writing, the insurer shall not be liable for loss or damage to the car "while encumbered with any lien or mortgage" is valid; but such a stipulation is void under a statute providing that any provision in the policy shall be null and void, the effect of which is to declare the policy void "if said property is encumbered by a lien of any character, or shall, after the issuance of such policy, become encumbered by a lien of any character." Where a state has enacted such a statute, the legal rights of the insured cannot be impaired by the use of any clause in the policy that would tend to limit or contravene the provision of the statute. Said a Texas court, construing such a statute: "The statute expressly renders of no force or effect a provision that the policy shall become void if the property insured is

52. Simpionbato v. Royal Ins. Co. (1925), 253 Mass. 606, 149 N. E. 666.

encumbered by a lien at the time of its issuance, or becomes so encumbered thereafter. * * * The manifest purpose of the statute was to cut off the defense to a suit to collect the policy, based on the fact that the property was encumbered when the policy was issued or at any time thereafter. * * * The insurer cannot evade the statute by merely using language in the exemption clause different from that used in the statute, but intended to accomplish the same purpose as that which was prohibited by the statute and clearly apparent from its terms.[53] So, in Ontario, Canada, the Insurance Act supersedes any policy provision to the contrary where insured warrants himself to be the sole and unconditional owner of the insured car, and it also applies where the insured has given a chattel mortgage on the car as security for a debt.[54]

§ 248. Unconditional and sole owner. (g) Registration.

IT HAS BEEN HELD THAT ASSURED IS NOT UNCONDITIONAL AND SOLE OWNER WHERE PROVISION OF STATUTE FOR RECORDING TRANSFER OF TITLE HAS NOT BEEN COMPLIED WITH.

In Ohio, it was sought to transfer from the husband to the wife the insured automobile and the fire and theft insurance policy thereon, but the registration law of the state relative to transfer had not been complied with, either at the time of procuring the insurance, or at the time the liability was claimed to have arisen. The court held unconditional and sole owner of an insured automobile, within the meaning of the policy provision, was one who was recognized under the registration laws of the state as such.[55]

§ 249. Unconditional and sole owner. (h) Stolen car insured.

UNDER THE THEFT INSURANCE POLICY PROVIDING THAT IT SHALL BE VOID IF THE INTEREST OF THE ASSURED IS OTHER THAN UNCONDITIONAL AND SOLE OWNERSHIP, IT HAS BEEN HELD BY COURTS OF LEADING JURISDICTIONS THAT THERE IS NO RIGHT OF

53. Hartford F. Ins. Co. v. Owens (Tex. Civ. App.), 272 S. W. 611 (1925).

54. Rockmaker v. Motor Union Ins. Co. (1922), 52 Ont. L. Rep. 557, 70 D. L. R. 360, affirming 52 Ont. L. Rep. 553, 69 D. L. R. 177 (1922).

55. Ohio Farmers' Ins. Co. v. Todino, 111 Ohio St. 274, 145 N. E. 25 (1924).

RECOVERY WHERE THE INSURED AUTOMOBILE IS A STOLEN CAR, WHICH WAS PURCHASED IN GOOD FAITH BY THE ASSURED.

CONTRA. BUT, ON THE OTHER HAND, IT HAS BEEN HELD BY COURTS OF OTHER STATES THAT UNDER THEFT INSURANCE POLICY CONTAINING SUCH A CLAUSE, WHERE THE ASSURED IS A BONA FIDE PURCHASER OF THE INSURED CAR, HIS TITLE IS GOOD AS AGAINST ANYONE BUT THE ORIGINAL OWNER, AND ASSURED CAN RECOVER WHERE HE WAS IN POSSESSION OF THE CAR AT THE TIME OF THE THEFT, ESPECIALLY IF OWNER MAKES NO CLAIM.

An insurable interest is necessary to the validity of an automobile insurance policy,[56] and a policy in favor of one having no interest, legal or equitable, in the thing insured, is viewed as a mere wager, and the courts will not enforce it.[57] One has no insurable interest in a thing whose only right to it arises under a contract which is void or unenforceable either at law or in equity.[58] The burden of proof is on the person insured to prove his insurable interest when suing on an insurance contract.[59] It is because of these well recognized principles of insurance law that in an Iowa case[60] the court held that where an automobile theft policy provides that the policy shall be void if the interest of the insured is other than "unconditional and sole ownership," the policy is void where the automobile insured is a stolen automobile, which insured had purchased in good faith, for insured acquired no title and did not have the legal ownership in the automobile required by the policy. The reasoning of the court was this: that whatever interest the insured had in the insured property must have been derived under his contract of purchase. His vendor was not shown to have had anything more than the possession

56. Hessen v. Iowa Auto. Mut. Ins. Co., 195 Iowa 141, 190 N. W. 150, 30 A. L. R. 658 (1922).

57. Hessen v. Iowa Auto. Mut. Ins. Co., 195 Iowa 141, 190 N. W. 150, 30 A. L. R. 658 (1922).

58. Hessen v. Iowa Auto. Mut. Ins. Co., 195 Iowa 141, 190 N. W. 150, 30 A. L. R. 658 (1922).

59. Hessen v. Iowa Auto. Mut. Ins. Co., 195 Iowa 141, 190 N. W. 150, 30 A. L. R. 658 (1922); But see Giles v. Citizens' Ins. Co., 32 Ga. App. 207, 122 S. E. 890.

60. Hessen v. Iowa Auto. Mut. Ins. Co., 195 Iowa 141, 190 N. W. 150, 30 A. L. R. 658 (1922).

of a stolen car. Through his purchase plaintiff acquired no title, and clearly never had such ownership as was required and defined by the terms of the policy. No one can convey a valid title to goods or chattels unless the vendor is the owner thereof, or lawfully represents the owner. And it is the duty of the vendee to determine whether he is securing good title to the thing purchased, and if title fails and loss ensues, the purchaser must look to his vendor. Generally speaking, no one can transfer a better or higher title to a chattel than he himself has.[61] The burden was upon the plaintiff to establish his insurable interest in the property described in the policy, and that burden required that he establish the interest which was defined in the policy. The recital of ownership is a valid provision, and by the terms of the policy the insurance was void if the insured was other than the unconditional and sole owner. This the evidence failed to establish.

In a Massachusetts case, after the loss the assured learned that unknown to him the automobile was stolen at the time he obtained it. To acquire title, he was obliged to pay the true owner. The insurance policy contained the provision that "the automobile described was fully paid for by the assured." The court held that as the assured was not the owner of the car on the date of the contract, the policy did not attach, and there was no valuable consideration to support the agreement.[62]

In a Georgia case, it was held that the assured would be considered to be sole and unconditional owner of the insured car, within the meaning of the clause of an automobile insurance policy where, under claim of right, the assured had exclusive and undisputed use, possession and enjoyment of the car. But such ownership will not be assumed from mere possession.[63]

61. Hessen v. Iowa Auto. Mut. Ins. Co., 195 Iowa, 141, 190 N. W. 150, 30 A. L. R. 658 (1922).

62. Gormley v. Westchester Fire Ins. Co., 256 Mass. 221, 152 N. E. 320 (1926).

63. Giles v. Citizens' Ins. Co., 32 Ga. App. 207, 122 S. E. 890 (1924).

But it has been held in New Jersey that where the insured is a *bona fide* purchaser of an automobile on which a policy of theft insurance has been issued, his title is good as against anyone but the original owner, and proof even that insured obtained title through mesne conveyance from a vendor whose signature was forged was insufficient to void the policy on account of the unconditional ownership clause where the insured was in possession of the car at the time the policy issued and when the theft took place.[64] In another case in the state of New Jersey the insured had purchased the automobile from one John Cox for $750.00. He spent about $400 in repairing the car and equipping it with new tires. His first fire and theft policy on the car, written for one year, expired, and then it was renewed; thereafter the car was stolen. The insurer denied liability on the ground that the insured was not the lawful owner; that the car was the property of one Louis F. Friend, who had the car insured in the Northern Insurance Company against theft; that the car had been stolen from Friend and the insurance company had paid Friend for the loss, and that thereby the car became the property of the insurer. The insurance company contended that the insured was not sole and unconditional owner of the automobile. But the court said: "We think that 'sole ownership' as used in the policy means nothing more than that no one else is interested with the insured, in the ownership of the car. In this view, it is obvious that there was no volation by the plaintiff of the condition of the policy."[65]

In a Washington case, the theft policy provided that recovery could not be had unless the assured was sole and unconditional owner. The assured was a *bona fide* purchaser of the insured car, but the car had been stolen from the original owner. The original owner was making no claim whatever. The title was good against everyone but the original

64. Norris v. Alliance Ins. Co. of Philadelphia, 1 N. J. Misc. 315, 123 Atl. 762 (1924).

65. Savarese v. Hartford Fire Ins. Co., 99 N. J. L. 435, 123 Atl. 763 (1924).

owner. The court held that as the original owner was making no claim to the car, the assured, having purchased the automobile in good faith, could recover.[66]

§ 250. Waiver—Knowledge.

PROVISIONS OF AUTOMOBILE FIRE AND THEFT INSURANCE POLICY FOR UNCONDITIONAL AND SOLE OWNERSHIP AND AGAINST ENCUMBRANCE MAY BE WAIVED.

The provisions of the automobile fire and theft insurance policy that the assured shall be unconditional and sole owner and against encumbrance may be waived by the acts of the insurer's agent, knowledge, or ratification.[67]

Where fire policy contained the usual provisions for voidance, and it was known at the time the policy was issued that "the interest of the assured in the subject of this insurance was other than 'unconditional and sole ownership,'" the right of the insurer to forfeit the policy was waived for such deficiency.[68]

§ 251. Waiver—Knowledge. (a) Conditional sale contract.

An automobile insurance policy issued to the purchaser of the automobile under conditional sale contract is valid, notwithstanding the reservation of title in the seller, when the agent of the insurer knew at the time the contract was entered into and the premium paid that the title to the automobile was not in the assured, but had been reserved by the seller.[69]

§ 252. Waiver—Knowledge. (b) Joint ownership.

Where the company's agent knew at the time the policy

66. Barnett v. London Assur. Corp., 138 Wash. 673, 245 Pac. 3 (1926).

67. British-American Assur. Co. v. Jaymes, —— Ohio App. ——, 159 N. E. 857 (1929).

68. Anderson v. United States Fire Ins. Co., —— N. D. ——, 222 N. W. 609 (1929).

69. Baker v. Northern Assurance Co., Ltd. of London, Eng., 214 Mich. 540, 183 N. W. 61; Grantham v. Royal Ins. Co., 34 Ga. App. 415, 130 S. E. 589 (1926); Simon v. Mechanics' Ins. Co. of Philadelphia, 31 Ga. App. 137, 121 S. E. 342 (1924).

was written that the automobile stood in two names, the policy requirement as to unconditional ownership was waived.[70]

§ 253. Waiver—Knowledge. (c) Adjuster.

Provision of the automobile fire insurance policy against encumbrance is waived where the adjuster for the insurance company notified the company that its agent had a mortgage on the car, and thereafter, with knowledge of the encumbrance, the insurer sent a telegram to the insured that it would pay the loss.[71]

§ 254. Waiver—Knowledge. (d) Joint interests.

It has been held in Maryland that the fact that assured shared title to the insured automobile with another, who intended to pay part of the purchase price, but never did, and never used the car, was not a breach of the unconditional and sole ownership clause of the theft policy, where the insurer's agent, at the time the policy was written, had knowledge that the insured was sharing his title with another. Under such circumstances, the condition of warranty was waived.[72]

§ 255. Waiver—Knowledge. (e) Other interests.

If the insurer or its agent at the time the policy is written containing sole and unconditional ownership provision knows that there are other interests in the insured automobile than that of the insured, the insurance company, having such knowledge, will not be permitted to declare forfeiture of the policy on the ground that the insured falsely represented that he was sole and unconditional owner. So, an insurance company cannot declare forfeiture of automobile theft insurance policies under representation that plaintiff was sole and unconditional owner, where policies cover-

70. Auto. Ins. Exchange v. Wilson, 144 Md. 249, 124 Atl. 876.

71. Spivey-Johnson Portrait Co. v. Belt Auto. Indemnity Ass'n, 210 Ala. 681, 99 So. 80 (1924).

72. Automobile Ins. Exch. v. Wilson, 144 Md. 249, 124 Atl. 876 (1923).

ing automobile trucks, which were issued to a dealer and assigned to plaintiff who had made a loan to the dealer, showed on the face of the policies that others than plaintiff had an interest in the ownership of the motor trucks insured.[73]

§ 256. Waiver—Knowledge. (f) Return of premium.

When an insurance company learns that the policy on an insured automobile is void because it is encumbered, the insurer must act with reasonable promptness and return to the insured the unearned premium, otherwise it will be considered as having waived the provision.[74]

Where the policy provided that a change in the title would invalidate it and there was an absolute sale of an insured automobile with reservation of title, under Texas statute[75] the reservation constituted a chattel mortgage, and avoided the policy. But the rule was applied that if the agent had knowledge of the sale and thereafter neglected to return the unearned premium, the provision might be waived. However, it was held that the evidence was insufficient to prove that the insurer's agent had knowledge of the sale, and the clause was not waived.[76]

§ 257. Waiver—Knowledge. (g) Request for payment.

But request for payment of past due assessments in itself will not waive forfeiture of automobile theft insurance policy.[77]

§ 258. Estoppel. (a) General rule.

It is a general rule that where an applicant for automobile insurance gives to the agent of the insurer full information

73. Bell v. Hanover Fire Ins. Co., 107 Ore. 513, 214 Pac. 340 (1923).

74. National Mut. Ins. Co. of Celina, Ohio, v. Bales, 81 Ind. App. 302, 139 N. E. 703, rehearing denied, 81 Ind. App. 302, 141 N. E. 481.

75. Texas Rev. St. Art. 5654.

76. Hamilton v. Fireman's Fund Ins. Co. (Tex. Civ. App.), 177 S. W. 173 (1915).

77. Palmer v. Bull Dog Auto. Ins. Ass'n, 294 Ill. 287, 128 N. E. 499 (1921).

concerning the legal title to the car and discloses that he is not unconditional and sole owner of the car, and the agent, acting within the scope of his authority, executes and delivers to the applicant the policy and accepts the premium, the knowledge so acquired by the agent is imputed to the company, and the company is thereafter estopped in an action on the policy from defending on the ground that the assured did not have the legal title required by the provision of the policy.[78]

§ 259. Estoppel. (b) Knowledge of intention to encumber.

Even though at the time of issuing the policy the insurer has knowledge that the insured intended to mortgage the car, it is not estopped from relying on the provision of the policy against encumbrance where the policy provides that the property will not be encumbered without the written consent of the insurer.[79]

§ 260. Estoppel. (c) Change of ownership.

Even though the automobile insurance policy provides that a change of ownership will avoid the policy and that no agent of the insurance company can waive any of the policy provisions, unless such waiver is in writing and attached thereto, the insurer will be estopped from defending the action on the ground of breach of the warranty clause in question where the agent of the insurer had knowledge that before the policy was written the insured automobile had been transferred to another.[80]

§ 261. Estoppel. (d) Inquiry.

But it was held in a Maryland case, where neither the insurer or its agent knew that the insured car was mortgaged, and no inquiry was made by the agent of the insured,

78. American Ins. Co. v. Jueschke, 110 Okla. 250, 237 Pac. 585 (1925).

79. International Indemnity Co. v. Duncan (Tex. Civ. App.), 254 S. W. 233 (1923).

80. Commercial Union Assur. Co. v. Lyon & Kelly, 17 Ga. App. 441, 87 S. E. 761 (1915).

the insurer was not estopped from relying on the provision of the policy that it was void in case of encumbrance. The opinion of the court reads: "If it be objected that there is no contention in the case at bar that the erroneous answer * * * was fraudulently written by the agent of the company, but that only negligence is charged, it is sufficient to call attention to the fact that it nowhere appears in the record that the assured was ignorant of the answer written by the agent, and the presumption is that, even if he did not know it at the time it was written, he knew it after he accepted the policy. He does not even claim that he did not know of the erroneous answer. If he knew it then, it was a fraud upon his part not to disclose the error to the agent of the company." [81]

Thus, in an Ohio case, an insurance policy was issued insuring an automobile against loss or damage arising from collision. The policy contained the following statement: "The automobiles herein described * * * are not mortgaged nor encumbered except as follows:" No exceptions to the statement were made by the insured. The policy contained provision that it would be void if the automobile be "encumbered by any lien or mortgage without the assured giving insurer written notice of such encumbrance." At the time of issuance there was an existing chattel mortgage on the automobile, which fact neither the company nor its agent knew. The rule was laid down that the mortgage lien was material to the risk and so made by the contract, and, in the absence of knowledge thereof on the part of the company or its agent, there was no waiver of the provision relating to the encumbrance. The failure of the agent to make oral inquiry as to the encumbrance

81. Eagle Star & British Dominions Ins. Co. v. Main, 140 Md. 220, 117 Atl. 571 (1922); But see (supra) Lindstrom v. Employers' Indemnity Corp., 146 Wash. 484, 263 Pac. 953 (1928); Collum v. National Fire Ins. Co., 181 Wis. 425, 195 N. W. 333 (1923).

of which he had no knowledge did not absolve the assured from the duty of making disclosure thereof.[82]

But it has been held that an insurer waives unconditional ownership clause of automobile insurance policy by failure to incorporate truthful answers which are given by the assured concerning his title to the car.[83]

§ 262. Pleading.

Where the insurance company desires to defend on the ground that the insured violated the contract by breaches of warranties against encumbrances by liens or mortgages on the insured property, such breaches must be pleaded.[84]

§ 263. Burden of proof. (a) Waiver.

Where plaintiff alleges waiver of the provisions of the policy against encumbrances, in his declaration, the burden of proof is on him to affirmatively prove such waiver.[85]

§ 264. Burden of proof. (b) Chattel mortgage.

In an action on an automobile theft policy where the insurer defended on the ground that assured had placed a chattel mortgage on the car contrary to the terms of the policy, the burden was on assured to show that the mortgage was void because it was not signed by his wife.[86]

§ 265. Burden of proof. (c) Title.

In an action on an automobile theft insurance policy containing the unconditional and sole ownership clause, the burden is on the assured of proving that he had such a title as fulfilled the provision of the policy.[87]

82. Michigan Auto. Ins. Co. v. Van Buskirk, 115 Ohio St. 598, 155 N. E. 186 (1927).

83. Lindstrom v. Employers' Indemnity Corporation, 146 Wash. 484, 263 Pac. 953 (1928).

84. Caldwell v. City of New York Ins. Co. (Mo. App.), 245 S. W. 602 (1922).

85. Buysse v. Connecticut Fire Ins. Co., 240 Ill. App. 324 (1926).

86. Beckley v. National Fire Ins. Co., 194 Iowa 1106, 190 N. W. 954 (1923).

87. Hessen v. Iowa Automobile Mutual Ins. Co., 195 Iowa 141, 190 N. W. 150 (1923), 30 A. L. R. 657.

§ 266. Burden of proof. (d) Purchase money notes.

Where possession by the insurer of past due purchase money notes of a prior owner of an insured automobile is insufficient to show that they had not been paid, the burden of proof that the insured was not sole and unconditional owner of the insured car was on the insurer, and the proof was insufficient.[88] If the insurer had claimed to be the owner and holder of the purchase money notes in its possession, of the original owner, then a presumption would have arisen that they had not been paid.[89]

§ 267. Evidence. (a) Parol.

Parol evidence of notice to the insurance company of retention of title to an automobile is admissible.[90]

It was held in a Georgia case that parol evidence was inadmissible to show that the insured, in an action on a theft policy, told the local agent to whom the application was made, that he was indebted for certain sum on the purchase price, and that "retention title notes" were outstanding, where the policy provided that the facts set forth with respect to the purchase of the car were statements of fact, known to and warranted by the insured to be true, and a further provision stated that the automobile was fully paid for by the insured, and was not mortgaged or otherwise encumbered, except as stated, and no exception was noted, and another clause provided that the terms of the policy embodied all agreements then existing between the insured and the company, or any of its agents, relating to the insurance described.[91]

§ 268 Evidence. (a) Parol. (a1) Contract of sale unsigned by seller.

In an action on a fire insurance contract providing that

88. Alliance Ins. Co. v. Williamson, 36 Ga. App. 497, 137 S. E. 277 (1927).
89. Alliance Ins. Co. v. Williamson, 36 Ga. App. 497, 137 S. E. 277 (1927).
90. Conyers v. Yorkshire Ins. Co., 30 Ga. App. 6, 117 S. E. 102 (1923).
91. Conyers v. Yorkshire Ins. Co., 30 Ga. App. 6, 117 S. E. 102 (1923).

the insurer would not be liable if the property was encumbered by lien or mortgage, parol evidence was admissible to explain transaction by which insured secured loan and signed document purporting to be contract of sale to him of automobile, withholding title in the seller, when document was apparently unsigned by the party named as seller.[92] It was a question of fact for the trial court whether it constituted a lien or mortgage.[93]

§ 269. Evidence. (b) Proof of misrepresentation.

An old policy of fire insurance on an automobile did not show the policy to be encumbered, but recited that it was "purchased under contract."[94] A renewal policy was issued containing the usual forfeiture provision for encumbrances. The insured testified that he was not asked any questions concerning encumbrance on the car by the agent, and when the policy was delivered to him, after looking at the outside, he placed it in the drawer of his desk, without reading. The agent, on the other hand, testified that he obtained the statement incorporated in the policy concerning freedom of the property from encumbrance by personal interview with the insured, which datum he put down on an unnumbered copy of a daily report sheet. The finding of the trial court that misrepresentation and fraud had not been established was sustained.[95]

§ 270. Evidence. (c) Sufficiency.

It was held in a Kansas case that the evidence was sufficient to justify a finding that there had been a violation of the provision of the automobile theft policy against any change in the ownership or interest of the insured where the evidence showed that the insured's father-in-law had

92. Bennett v. Northwestern Nat. Ins. Co., 53 Cal. App. 800, 257 Pac. 586 (1927).

93. Bennett v. Northwestern Nat. Ins. Co., 53 Cal. App. 800, 257 Pac. 586 (1927).

94. North British & Mercantile Ins. Co. v. Dillman, 24 Ariz. 1, 206 Pac. 171 (1922).

95. North British & Mercantile Ins. Co. v. Dillman, 24 Ariz. 1, 206 Pac. 171 (1922).

made three installment payments on the car, had taken out a license in his own name to carry passengers for hire, had sworn under oath that he had purchased the car from the insured, and the car had been delivered to him.[96]

§ 271. Evidence. (d) Ownership.

In an action on a fire policy for loss of a truck, where the seller had taken a mortgage on the truck and subsequently had transferred it to another corporation which continued the business under another name, it was not hearsay for salesman who had sold truck and collected payments on the mortgage from both companies to testify concerning its ownership.[97]

§ 272. Evidence. (e) Encumbrance—Knowledge.

In an action on an automobile insurance policy which provided that the policy would be void if the car was encumbered with a lien, the assured testified that when he paid for the policy he advised the agent that he was glad he had the policy for his own protection and for that of the man he bought the car from. It was held that the evidence was sufficient to warrant a finding that the insurance company had knowledge that the car was encumbered.[98] In a New York case where the automobile theft insurance policy contained the unconditional and sole ownership clause, the assured sought to reform the policy and recover on the ground that at the time the policy was applied for the assured had informed the insurer's agent that he had but a conditional interest in the automobile, and the agent advised him that he would obtain from the dealer the necessary information to properly describe applicant's interest in the car, but did not do so. The court reasoned that the

96. Wood v. American Auto. Ins. Co. (1921), 109 Kan. 801, 202 Pac. 82 (1921).

97. Zabarsky v. Employers' Fire Ins. Co., 97 Vt. 377, 123 Atl. 520 (1924).

98. Davidson v. American Central Ins. Co., 80 N. H. 552, 119 Atl. 707 (1923).

evidence was admissible, otherwise there would be an opportunity for fraud being perpetrated upon the assured by the insurer taking his premium money and giving him nothing of value in return. Whether such a statement was made by the insured's agent to the assured was a question of fact for the jury to determine.[99]

§ 273. Evidence. (f) Finding.

Finding that the company issued individual certificate or policy insuring plaintiff's automobile, which policy was in force at the time the car was destroyed, and on named date the automobile owned by plaintiff and insured by the defendant company, was destroyed by fire, and that there was due plaintiff on account of such loss a specified sum was, in effect, to hold that plaintiff was the owner and had an interest in the property when the contract was executed and at the time of the fire.[1]

§ 274. Defense. (a) Agency.

UNCONDITIONAL AND SOLE OWNERSHIP CLAUSE NOT A DEFENSE WHERE FATHER TAKES OUT INSURANCE POLICY IN HIS OWN NAME FOR BENEFIT OF HIS SON.

It has been held in a Texas case that the unconditional and sole ownership clause on a policy of theft insurance is not good as a defense where the policy was taken out by a father in his own name for the benefit of his son. The court also held that the son had a right of action in his own name against the insurance company on the policy upon proof that the father was acting as the agent of the son in procuring the insurance.[2]

§ 275. Defense. (b) Statutory provision.

In an action on an automobile fire and theft policy, where the car was stolen and burned, under Texas statute making

99. Hessler v. North River Ins. Co. of City of New York, 221 App. Div. 595, 207 N. Y. S. 529 (1925).

1. National Fire Ins. Co. v. Gellman, 83 Ind. App. 219, 144 N. E. 154 (1924).

2. Franklin Fire Ins. Co. v. Britt (Tex. Civ. App.), 254 S. W. 215 (1923).

void provisions in fire policies forfeiting policies on account of encumbrances without consent of the insurer, it was held that the insurer could not defend on the ground that insured property was encumbered, irrespective of whether such encumbrance contributed to or brought about the loss.[3]

§ 276. Instructions. (a) Unconditional ownership.

In an action on an automobile theft policy the trial court erred in refusing to instruct the jury that insured could not recover unless he showed by a preponderance of the evidence that he was the sole and unconditional owner of the insured automobile.[4]

§ 277. Instructions. (b) Failure to call witness.

It was error for the trial court to instruct the jury in an action on an automobile fire policy where the defense was that the insured was not the sole owner of the car, that the failure of the defendant to call as a witness a person who was in court who sold insured the car, to controvert the insured, would justify an unfavorable inference against the insurance company, for it was for the jury to say whether one party needed corroboration more than the other needed denial of the material facts.[5]

§ 278. Jury. (a) In general.

Whether the insured is sole and unconditional owner of the automobile is a question for the jury, in an action by the insured for recovery on the policy.[6]

3. Hartford Fire Ins. Co. v. Owens (Tex. Civ. App.), 272 S. W. 611 (1925).
4. North River Ins. Co. v. Atkinson, 137 Va. 313, 119 S. E. 46 (1923).
5. Vollmer v. Auto. Fire Ins. Co., 207 App. Div. 67, 202 N. Y. S. 374 (1923).
6. United Automobile Ins. Ass'n of Indianapolis v. Henderson, 81 Ind. App. 231, 139 N. E. 680; Continental Ins. Co. v. Burns, 144 Md. Rep. 429. 125 Atl. 232 (1924); Andrews v. Bull Dog Auto. Fire Ins. Ass'n of Chicago (Mo. App.), 258 S. W. 714 (1924); Hirsch v. City of New York Ins. Co., 218 Mo. App. 673, 267 S. W. 51 (1924); Davidson v. American Central Ins. Co., 80 N. H. 552, 119 Atl. 707 (1923); Hessler v. North River Ins. Co., 211 App. Div. 395, 207 N. Y. S. 529 (1925); Vollmer v. Auto. Fire Ins. Co., 207 App. Div. 67, 202 N. Y. S. 374 (1923); North River Ins. Co. v. Atkinson, 137 Va. 313, 119 S. E. 46 (1923); Erickson v. American Ins. Co., 169 Minn. 507, 211 N. W. 830.

§ 279. Jury. (b) Conflict in evidence.

On a burglary and fire policy in Missouri, where the policy originally stated that the automobile was not mortgaged, but assured claimed that he told the agent about the mortgage, and did not see what the agent wrote in the policy, and where the mortgage note was paid before a rider was attached to the policy, substituting a corrected description and increasing the amount of insurance, the court held that it was a question of fact for the jury to determine.[7]

§ 280. Jury. (c) Statute.

In an action on an automobile insurance policy in which the insurance company defended on the ground that a mortgage lien existed against the car, contrary to the policy, it was held that whether the fact that there was a mortgage upon the car contributed in any way to the loss of the insured within statutory provision was a question for the jury.[8]

§ 281. Jury. (d) Mortgage.

Whether there was an existing valid mortgage outstanding against the automobile insured under a fire policy, that would defeat the insured's right of recovery, may be a question for the jury.[9]

§ 282. Jury. (e) Certificate as evidence of ownership.

Where the undisputed testimony of the husband was that he had paid for the insured car for which a certificate of title was issued in the name of his wife, without his knowledge or consent, as the certificate constituted certain evidence of ownership in itself and the husband had done nothing to correct it, the question was properly one for the jury.[10]

7. Andrews v. Bull Dog Auto. Ins. Co. of Chicago (Mo. App.), 258 S. W. 714 (1924).

8. Davidson v. American Central Ins. Co., 80 N. H. 552, 119 Atl. 707 (1923).

9. Stoddart v. Nat. Liberty Ins. Co. of America (Mo.), 251 S. W. 398 (1923).

10. Hirsh v. City of New York Ins. Co., 218 Mo. App. 673, 267 S. W. 51 (1924).

CHAPTER IX.

RISKS AND CAUSES OF LOSSES.

SECTION.

283. Duration of risk.
284. Countersigning.
285. Identity of insured car.
286. Insured car driven contrary to law—Public policy.
287. Same—Registration—Unlicensed chauffeur.
288. Chattel mortgage creditor.
289. Value of car—Price reduced.
290. Partnership—Wilful burning.
291. Illegal transportation of liquor.
292. Contract not terminated by foreclosure.
293. Hazards not covered.

§ 283. Duration of risk.

Theft policy was delivered in blank without describing the automobile or stating the amount of insurance, rate, premium or duration, except that it was to be from noon of a certain day to noon of a later date, the dates being left blank. Binding slip was issued in connection with the policy which stated the rate, premium, description, amount of insurance, and its duration as being from the 30th day of August to the same day of September. The insured automobile was stolen on the afternoon of August 30th. Insurer contended that policy was not in force, as binder read "from" the 30th day of August. The court held that construing the policy and binder together it was clear the policy insured from noon of August 30th to noon of the same day of September.[1]

§ 284. Countersigning.

On June 13, 1921, the assured paid one who was not an insurance agent for insurance on an automobile for one year. Four days later the company countersigned and

1. Troy Automobile Exchange v. Home Insurance Co., 102 Misc. 331, 169 N. Y. S. 796 (1918).

issued the policy, dated June 13, 1921, and purported to fix the insurance from June 12, 1921, to June 13, 1922. The policy contained a provision that it was valid only when countersigned by a duly authorized agent. The court held that damage to the automobile occurring on June 15, 1922, was covered by the policy.[2]

§ 285. Identity of insured car.

Where the license and the liability policy are limited to the particular car named, the insurer is not liable for injury caused by a different car operated by the same owner.[3]

§ 286. Insured car driven contrary to law—Public policy.

Provision that policy would not cover any loss occurring while the automobile was being driven contrary to law is not unreasonable or contrary to public policy, but is valid and enforceable.[4]

§ 287. Insured car driven contrary to law—Registration—Unlicensed chauffeur.

In an action on a fire policy arising in the state of Kentucky, the policy exempted the insurer from liability for loss occurring while the insured automobile was being driven under circumstances, or in a manner, or by a person, prohibited by law. Said the court: "As the policy in question was delivered to, and accepted by, appellee, it necessarily results that it is the full measure of appellant's liability, unless it can be said that the foregoing provisions exempting it from liability are unreasonable or contrary to public policy * * *. The natural effect of such provisions is to encourage the observance of the law, and, that being true, there is no basis whatever for the contention that the provisions are contrary to public policy.

According to the allegations of the answer and amended

2. Davis v. Home Insurance Co., 125 S. C. 381, 118 S. E. 536 (1923).
3. Downs v. Georgia Casualty Co., 271 Fed. 310 (1921).
4. Standard Auto. Ins. Ass'n v. Neal, 199 Ky. 699, 251 S. W. 966 (1923).

answer, the machine, at the time of its destruction by fire, was being driven by an unlicensed chauffeur, was not registered as required by statute, and the registration plates thereon neither belonged to nor had been issued to appellee. If these allegations be true, the machine was destroyed by fire while it was being driven under circumstances and by a person prohibited by law, and therefore at a time when the loss or damage was not covered by the policy." Judgment of the lower court was reversed.[5]

§ 288. Chattel mortgage creditor.

A policy of insurance indemnified a creditor who had chattel mortgage automobile notes as security against such "direct pecuniary loss" as may be sustained by "being deprived of the security." The court held that the policy protected the creditor against such loss as he might suffer by reason of the disappearance of his security, and did not cover the entire indebtedness of the maker of the chattel mortgage notes.[6]

§ 289. Value of car—Price reduced.

Liability of insurer is not affected where seller of automobile trucks, after right of action of buyer accrues, enters into a new contract with buyer wherein purchase price of trucks is reduced.[7]

§ 290. Partnership—Wilful burning.

Where fire insurance policy covering automobiles owned by partners, stipulated that the company would not be liable for loss caused by failure to use reasonable means to preserve the property and one partner wilfully set the auto-

5. Standard Auto. Ins. Ass'n v. Neal, 199 Ky. 699, 251 S. W. 966 (1923), 35 A. L. R. 1471.

6. Automobile Finance & Securities Co. v. Globe Indemnity Co., 161 La. 303, 108 So. 545 (1926).

7. Cook Motors Corp. v. Casualty Ass'n of America, 239 Mich. 362, 214 N. W. 212 (1927).

mobiles on fire, the innocent partner was not entitled to recover from the insurance company.[8]

§ 291. Illegal transportation of liquor.

Policy provision exempting insurer of automobile if car was used for illegal transportation of liquor was construed to limit exemption to illegal handling of liquor at time of accident.[9]

§ 292. Contract not terminated by foreclosure.

An automobile theft policy insuring the interests of the vendor and vendee, as their interests might appear, under a conditional sales contract, provided that it should apply only so long as the contract remained in force. Where the vendor instituted foreclosure proceedings on a parcel of real estate which he held as security for the purchase price and the property did not sell for enough to discharge vendee's obligation under the contract, the court held that the contract was not terminated.[10]

§ 293. Hazards not covered—Riot, civil commotion, etc.

Under a policy insuring against loss by fire, burglary, housebreaking or theft, the insurer was excepted from liability for "loss or damage arising during (unless it be proved by the insured that the loss or damage was not occasioned thereby), or in consequence of * * * riot, civil commotion, military or usurped power," the car was held up by three or four armed men who blindfolded the chauffeur and took away the car. Previously, other cars had been commandeered under circumstances which indicated they were to be used for revolutionary purposes. Martial law was established shortly thereafter. The court in denying liability said: "The true meaning and scope of this policy is that where the arm of the ordinary law

8. Bellman v. Home Ins. Co., 178 Wis. 349, 189 N. W. 1028 (1922), 27 A. L. R. 945.

9. Ferry v. National Motor Underwriters, 244 Ill. App. 24.

10. Pennsylvania Fire Ins. Co. v. Johnson, 28 Ariz. 448, 237 Pac. 634 (1925).

is paralyzed by commotion, disturbance or riot, the insurers are not liable for theft by armed men."[11]

11. Motor Union Insurance Co. v. Boggan, 2 Ir. R. 136, H. L. (Ir.), (1923); See Cooper v. General Accident, Fire & Life Assur. Corp., 2 Ir. R. 214, H. L. (Ir.), 1922.

CHAPTER X.

MORTGAGEE INTEREST.

SECTION.

294. Insurable interest.
295. Loss payable clause—Construed.
296. (a) Notice of encumbrance.
297. (b) Knowledge.
298. (c) Vendor and vendee.
299. (d) Mortgagee can take possession.
300. "Loss, if any, payable to mortgagee, as his interest may appear".
301. (a) Other insurance.
302. (b) Carrying passengers for hire—Waiver.
303. (c) Exception—Where mortgagee is co-assured.
304. Policy form protecting interests of mortgagee.
305. Vendor and vendee.
306. Payment to mortgagee—Waiver.
307. Mortgagee is not bound by mortgagor's settlement.
308. Embezzlement rider.
309. Detachment of mortgage clause after payment of debt.
310. Change in purchase notes.
311. Statutes against encumbrances construed.
312. Pleading and practice—Parties.

IN GENERAL. MORTGAGOR AND MORTGAGEE HAVE SEPARATE AND DISTINCT INSURABLE INTERESTS, EACH OF WHICH MAY BE COVERED BY THE AUTOMOBILE INSURANCE POLICY, EITHER SEPARATELY OR JOINTLY.

LOSS PAYABLE CLAUSE. POLICY PROVIDING THAT "LOSS, IF ANY, PAYABLE TO MORTGAGEE, AS HIS INTEREST MAY APPEAR," CONFERS ON THE MORTGAGEE NO BETTER RIGHT OF RECOVERY THAN THAT OF THE MORTGAGOR.

EXCEPTION. BUT WHERE THE MORTGAGEE IS ONE OF THE ASSURED, AND THE POLICY COVERS ITS INTEREST AS MAY APPEAR, IT HAS BEEN HELD IN NEW YORK THAT THE RULE IS OTHERWISE.

MORTGAGE CLAUSE. WHERE THE MORTGAGE CLAUSE PROVIDES THAT THE "INSURANCE, AS TO THE INTEREST OF THE MORTGAGEE ONLY HEREIN, SHALL NOT BE INVALIDATED BY ANY ACT OR NEGLECT OF THE MORTGAGOR OR OWNER," THE MORTGAGEE HAS A SEPARATE AND DISTINCT CONTRACT OF INSURANCE FROM THE MORTGAGOR.

§ 294. Insurable interest.

The mortgagor and mortgagee of an automobile have separate and distinct insurable interests therein, each of

which may be covered by insurance, separately or jointly.[1] Thus, a policy obtained by the owner of the car is not impaired by a policy which is taken out by the mortgagee.[2]

§ 295. Loss payable clause. Construed.

The clause of the automobile insurance policy providing that "loss, if any, payable to mortgagee, as his interest may appear," without more, confers on the mortgagee no better right of recovery on the policy than that of the owner in the absence of such clause. Where the "loss payable clause" is used and there is no stipulation in regard to the interest of the mortgagee, the general rule is that the contract of the mortgagee is merely collateral to that of the mortgagor, and that the rights of the mortgagee under such a policy are no greater than those of the mortgagor.[3] But in fire insurance policies, other than automobile, there are decisions to the contrary.[4] However, where the mortgage clause provides that the "insurance, as to the interest of the mortgagee only herein, shall not be invalidated by any act or neglect of the mortgagor or owner," it is considered, generally speaking, as a separate and distinct contract of insurance.[5]

§ 296. Loss payable clause. (a) Notice of encumbrance.

The loss payable clause attached as a rider to the automobile insurance policy requires that in event of loss payment shall be made to the mortgagee, at least to the extent

1. Investors' Mortgage Co. v. Marine & Motor Ins. Co. of America, 155 La. 627, 99 So. 486 (1924); Harvey v. Pawtucket Mut. Fire Ins. Co., 250 Mass. 164, 145 N. E. 35 (1924); Clower v. Fidelity-Phoenix Fire Ins. Co., 220 Mo. App. 1112, 296 S. W. 257 (1927); DeShields v. Insurance Company of North America, 125 S. C. 457, 118 S. E. 817 (1923); Thompson v. National Fire Insurance Co., 48 S. D. 224, 203 N. W. 464 (1925).

2. Thompson v. National Fire Ins. Co., 48 S. D. 224, 203 N. W. 464 (1925).

3. Hill-Howard Motor Co v. International Indemnity Co., 116 Kan. 109, 225 Pac. 1056 (1924).

4. Sunderlin on Fire Insurance, Lecture No. 34, Mortgagee Interest, p. 20.

5. New Brunswick Fire Insurance Co. v. Morris Plan Bank, 136 Va. 402, 118 S. E. 236 (1923); Sunderlin on Fire Insurance, No. 34, Mortgagee Interest, p. 24 et seq.

of the mortgagee's interest. It, also, is notice to the insurer that the insured car is mortgaged. In such a case, where the policy carries a loss payable clause, the provision of the policy that it is void if the insured car is encumbered is rendered ineffective.[6]

§ 297. Loss payable clause. (b) Knowledge.

Even though the policy does not contain a "loss payable clause," if it recites that the property insured is mortgaged, and subsequent to the loss the company's adjuster obtains information from the mortgagee as to the indebtedness, the insurer is liable to make payment to the mortgagee, at least to the extent of its interest, and has no right to make settlement with the owner.[7]

Where it was provided in the warranty against encumbrances of the policy for loss payable to mortgagees therein named, it was held that the condition was a loss payable mortgage clause and binding on the insurer.[8]

§ 298. Loss payable clause. (c) Vendor and vendee.

It has been held by the supreme court of the state of Idaho that under a loss payable clause of an automobile theft insurance policy the conditional vendor is a mere appointee of the conditional vendee to receive the insurance money, in case of loss. The legal rights of the conditional vendee, who is the insured, will determine the amount of recovery, if any. So, where the interest of the conditional vendee was transferred to his wife, contrary to the terms of the policy, there was no right of recovery.[9]

6. De Shields v. Insurance Company of North America, 125 S. C. 457, 118 S. E. 817 (1923).

7. Gibbes Machinery Co. v. Niagara Fire Insurance Co., 119 S. C. 1, 111 S. E. 805, 21 A. L. R. 1460 (1922).

8. Investors' Mortgage Co. v. Marine & Motor Insurance Co. of America, 155 La. 627, 99 So. 486 (1923).

9. Coffin v. Northwestern Mut. Fire Ass'n, 43 Idaho 1, 249 Pac. 89.

§ 299. Loss payable clause. (d) Mortgagee can take possession.

Where the policy contains a mortgage or loss payable clause, the insurer cannot avoid the policy for violation of a duty imposed by the contract because the mortgagee, under the terms of his contract with the assured, which was known to the insurer at the time the policy was issued, took possession of the car.[10]

§ 300. "Loss, if any, payable to mortgagee, as his interest may appear".

A clause in an automobile insurance policy reading, "loss, if any, payable to mortgagee, as his interest may appear," without more, will confer on the mortgagee no better right of recovery than that of the owner in the absence of such clause. The clause that the loss shall be paid to the mortgagee as his interest may appear merely appoints the mortgagee as the party to receive the payment due under the contract with the assured. The mortgagee has no greater rights than the mortgagor.[11] Thus, it has been held in the state of Virginia, the rights of the mortgagee under the policy are lost by acts of the assured that invalidate the policy.[12]

§ 301. "Loss, if any, payable to mortgagee, as his interest may appear." (a) Other insurance.

It has been held in a Washington case that where mortgagor of an automobile had a fire insurance policy providing against other insurance, and carried an endorsement for payment to mortgagee as his interest might appear, the act of the mortgagor in breaching the condition of the

10. Anderson v. United States Fire Ins. Co., —— N. D. ——, 222 N. W. 609 (1929).

11. Hill-Howard Motor Co. v. International Indemnity Co., 116 Kan. 109, 225 Pac. 1056 (1924); New Brunswick Fire Ins. Co. v. Morris Plan Bank, 136 Va. 402, 118 S. E. 236 (1923); East Side Garage v. New Brunswick Fire Ins. Co., 198 App. Div. 408, 190 N. Y. S. 634 (1921).

12. New Brunswick Fire Ins. Co. v. Morris Plan Bank, 136 Va. 402, 118 S. E. 236 (1923).

policy as to other insurance precluded mortgagee from recovering. Mortgagee's rights under the policy, in other words, were no greater than the mortgagor's.[13]

§ 302. "Loss, if any, payable to mortgagee, as his interest may appear." (b) Carrying passengers for hire—Waiver.

Under a provision in an automobile policy for payment of loss to insured's vendor as his interest may appear, such vendor cannot recover unless insured can recover. Under a "loss payable" clause, the rights of the beneficiary are coextensive with the insured. If by the provisions of the policy, it is void because the insured has breached the warranty against carrying passengers for hire, there is no liability by the insurer to pay the beneficiary under the loss payable clause.[14] But where the insurer's agent gave his oral consent to such use, knowing that the insured was relying on such consent, the insurer will be estopped from relying on the policy clause, even though the policy provided that the insurer's agent had no power to orally waive any provision of the policy.[15]

§ 303. "Loss, if any, payable to mortgagee, as his interest may appear." (c) Exception—Where mortgagee is co-assured.

But the courts have distinguished between the policy which contains a mortgage clause attached as a rider payable to mortgagee as his interests may appear and the policy itself insuring the parties "as their respective interests may appear." In the latter instance, the mortgagee is named as a co-assured, and a breach of warranty by the mortgagor would not defeat the right of the mortgagee to recover. In a New York case, where the policy was so

13. Wyley v. Federal Ins. Co., 136 Wash. 686, 241 Pac. 292 (1926).

14. East Side Garage v. New Brunswick Fire Ins. Co., 198 App. Div. 408, 190 N. Y. S. 634 (1921).

15. East Side Garage v. New Brunswick F. Ins. Co., 198 App. Div. 408, 190 N. Y. S. 634

worded, the mortgagor transferred his interest in violation of a provision of the policy, without the consent or knowledge of the mortgage company, but the court held that the rights of the mortgagee under the policy were not impaired. Said the court: "The law does not look with favor upon a forfeiture, and one will not be permitted unless a strict construction of the policy requires it. The language of the policy, being that of the insurer, is strictly construed against the company, and if there is any ambiguity the insured is entitled to the benefit of the doubt." [16]

§ 304. Policy form protecting interests of mortgagee.

A mortgagee of insured property may protect his interest so that no independent action of the mortgagor can injuriously affect it, either by insuring in his own name, or by having a clause inserted which stipulates that the interest of the mortgagee shall not be invalidated by the act or neglect of the mortgagor.[17]

§ 305. Vendor and vendee.

It has been held in Arizona that where an automobile insurance policy was issued jointly to vendor and vendee, that it was not terminated as result of foreclosure of vendor's mortgage.[18]

§ 306. Payment to mortgagee—Waiver.

Mortgagee of an automobile is entitled to receive payment from the insurer to the extent of his interest in a stolen car insured against theft. Such a payment will waive breach of the locking device warranty.[19]

16. Strombald v. Hanover Fire Insurance Co., 121 Misc. 322, 201 N. Y. S. 67 (1923).

17. New Brunswick Fire Ins. Co. v. Morris Plan Bank, 136 Va. 402, 118 S. E. 236 (1923).

18. Pennsylvania Fire Ins. Co. v. Johnson, 28 Ariz. 448, 237 Pac. 634 (1925).

19. Maryland Motor Car Ins. Co. v. Newell Contracting Co., 168 Ark. 658, 246 S. W. 468 (1925).

§ 307. Mortgagee is not bound by mortgagor's settlement.

Where an automobile fire and theft insurance policy made the loss, if any, payable to the mortgagee, it was held that the mortgagee was not bound by an adjustment and settlement between the insurer and the mortgagor, and that regardless of such a settlement, the mortgagee had a separate right of action to recover the amount of his interest.[20]

§ 308. Embezzlement rider.

An embezzlement rider attached to the policy is a contract by and between the assured and insurer. Where a loss payable clause is attached to the policy making it payable to the mortgagee as its interest may appear, or otherwise, the mortgagee is not protected from the misconduct of the mortgagor under the embezzlement clause.[21]

§ 309. Detachment of mortgage clause after payment of debt.

In an action on an automobile theft insurance policy, the assured detached from the policy the mortgage rider, after paying the debt for which the mortgage was given as security. The assured believed that the mortgage clause was no longer a part of the contract. The court held that the removal of the mortgage clause was not a "material alteration." The rule is that to be material, the alteration must change the legal effect of the instrument.[22]

§ 310. Change in purchase notes.

EXTENSION OF TIME FOR PAYMENT OF PURCHASE NOTES OF INSURED AUTOMOBILE IS NOT MATERIAL CHANGE TO INSURER'S PREJUDICE WITHIN PROVISION OF LOSS PAYABLE CLAUSE THAT POLICY WILL BE INVALIDATED IF ANY CHANGE WAS MADE IN THE NOTES.

20. First National Bank of Duluth v. National Liberty Insurance Co. of America, 156 Minn. 1, 194 N. W. 6 (1923.)

21. Hill-Howard Motor Co. v. International Indemnity Co., 116 Kan. 109, 225 Pac. 1056 (1924); Wyley v. Federal Insurance Co., 136 Wash. 686, 241 Pac. 292 (1926); Inland Finance Co. v. Home Ins. Co., 134 Wash. 485, 236 Pac. 73; New Brunswick Fire Ins. Co., v. Morris Plan Bank, 136 Va. 402, 118 S. E. 236 (1923).

22. Sawyer v. National Fire Insurance Co., —— S. D. ——, 220 N. W. 503 (1929).

Loss payable clause providing that if any change was made in purchase price notes of the insured automobile the policy would be void, constitutes a promissory warranty. But it has been held that where the indebtedness had been reduced $200 before the destruction of the car by fire, even though the policy further provided that the policy would be void if the notes were not paid within ten days after maturity, an extension of time to pay the balance due on the notes was not such a material change in the notes as would operate as a breach of warranty to void the policy and defeat recovery.[23]

§ 311. Statutes against encumbrances construed.[24]

Texas statutes prohibit forfeitures for breaches of warranty not contributing to the loss and avoidance of policies because of encumbrances. It was held in a Texas case, where it was provided in the loss payable clause that if the insured failed to pay each of the outstanding purchase-money notes, on or before ten days after their maturity, such a condition constituted a promissory warranty, and the insured could not recover. Said the court construing the policy condition in connection with the statute against encumbrances: "Such stipulation was specially entered into because it was contemplated to insert a loss payable clause in favor of the seller of the automobile holding the purchase-money notes. The fact of encumbrance or lack of encumbrance, merely as such, at the date of the policy, or after its date, is not, in terms, dealt with by the parties. Lien notes may, in legal effect, constitute an encumbrance against property, but there is a distinction between a contractual requirement to pay the notes at a particular time, and a contractual requirement that no encumbrance at all shall

23. National Union Fire Ins. Co. v. Avant, 167 Ark. 307, 268 S. W. 20 (1925).

24. See Davidson v. American Central Ins. Co., 80 N. H. 552, 119 Atl. 707; Hartford Fire Ins. Co. v. Owens (Tex. Civ. App.), 272 S. W. 611.

either exist presently or happen after the date of the policy.'' [25]

§ 312. Pleading and practice—Parties.

Mortgagee of an insured car, which was holder of the insurance policy as security for the payment of its mortgage lien, was not a necessary party to an action on the policy where it was shown that the claim of the mortgagee had been fully paid.[26]

25. Home Insurance Company of New York v. Henderson (Tex. Civ. App.), 263 S. W. 650 (1924).

26. Christiansen v. Bankers' & Shippers' Ins. Co., 49 S. D. 225, 207 N. W. 108 (1926).

CHAPTER XI.

NEGLIGENCE.

SECTION.
313. Fire Insurance.
314. Negligence after fire.
315. Fraudulent or wilful destruction.
316. Failing to act on application.
317. Estoppel.
318. Statute nullifies conflicting policy condition.

§ 313. Fire insurance.

The law is well settled that the insurer is responsible for loss directly contributed to by the negligence or carelessness of the insured or its agent. There seems to be no conflict among the authorities upon this general proposition. For there can be no doubt that one of the objects of insurance against fire is to protect the insured from loss, as well against his own negligence as that of his servants, and others. Therefore, the simple fact of negligence in either, however great in degree, has been held not to be a defense to an action on a policy insuring an automobile against fire.[1] Even though an automobile is destroyed by two fires which occurred two days apart, where the policy is silent, the insured cannot successfully defend on the ground that the insured neglected, after the first fire, to protect the car from further damage.[2]

§ 314. Negligence after fire.

But the rule does not apply after the fire. Proper diligence must be exercised at the time of the fire to save the personal property, for the insured cannot recover for any loss or damage to the insured property caused by the insured's negligence in caring for the property. Gross negli-

1. White v. Home Mutual Ins. Ass'n of Iowa, 189 Iowa, 1051, 179 N. W. 315 (1921).
2. St. Paul Fire & Marine Ins. Co. v. Huff (Tex. Civ. App.), 172 S. W. 755 (1915).

gence in failing to put out a fire will defeat recovery. Thus, in an action by an insured to recover for the destruction of his automobile by fire, where it was contended that the insured's servant was culpably negligent in not extinguishing the fire after its discovery, it was a question for the jury, and in determining such a question they could properly consider the proximity of the gasoline tank to the fire and the danger connected with any attempt to extinguish the fire.[3]

§ 315. Fradulent or wilful destruction.

It is well settled that, although the negligence or carelessness of the insured may cause or result in the destruction of his property, the insurer will be liable, unless the carelessness or negligence is of such a character as to amount to fraud or wilful misconduct on his part. The rule is that to relieve the insurer from liability the destruction of the property must have been caused or brought about by the fraudulent design, voluntary act, or intentional misconduct of the insured.[4] Thus, where the policies provided that the insurers should "not be liable for loss or damage caused directly or indirectly by * * * neglect of the insured to use all reasonable means to save and preserve the property at and after the fire," one of the two partners whose automobiles were insured wilfully set fire to the cars. The innocent partner had no right of recovery.[5]

§ 316. Failing to act on application.

The question arose in a Nebraska case as to whether or not the insurer was liable for negligently failing to act on the application for insurance within a reasonable length

3. Automotive Co. v. National Fire Ins. Co., 162 Minn. 34, 202 N. W. 32 (1925).

4. Sunderlin on Fire Insurance (Lecture on Negligence, p 4).

5. Bellman v. Home Ins. Co., 178 Wis. 349, 189 N. W. 1028, 27 A. L. R. 945 (1922).

of time, and the court held the evidence was insufficient to show actionable negligence.[6]

§ 317. Estoppel.

Assured may be estopped from asserting mistake or fraud because of his negligence. For example, in a Michigan case, the assured agreed with the agent to have his automobile insured against loss by fire and theft in the sum of $800 and against liability for $5,000. He signed application, without reading it, which limited liability of company to $800. He also accepted and retained the policy, without reading it. After judgment against him, the company refused to pay more than $800. Assured then had no right of action to recover for fraud because he was negligent.[7]

§ 318. Statute nullifies conflicting policy condition.

Under the provision of a statute that "an insurer is not liable for a loss caused by the wilful act of the insured; but he is not exonerated by the negligence of the insured, or of his agents or other," a condition of theft policy that "the insurance company shall not be liable for loss or damage from negligence unless the owner, at all times, shall take reasonable precautions to protect the car" is a nullity.[8]

6. Page v. National Automobile Ins. Co. of Lincoln, 109 Neb. 127, 190 N. W. 213 (1922).

7. Snyder v. Wolverine Mutual Motor Ins. Co., 231 Mich. 689, 204 N. W. 706 (1925).

8. Christiansen v. Bankers' & Shippers' Ins. Co., 49 S. D. 225, 207 N. W. 108 (1926).

CHAPTER XII.

VALUED POLICIES.

SECTION.

319. Open or valued policies.
320. Illustrations.
321. Validity.
322. Fraud will avoid policy.
323. Construction—Misdescription of age of second-hand automobile a breach of warranty.
324. Three-fourths value—(a) Missouri statute.
325. (b) Construed.
326. Depreciation—Vexatious refusal to pay.
327. Evidence.
328. Appraisal.
329. Pleading and Practice—(a) Election.
330. (b) Admission—Total loss.

DEFINITION. VALUED POLICY IS ONE WHICH FIXES THE VALUE OF THE AUTOMOBILE IN CASE OF LOSS, AT THE TIME THE POLICY IS WRITTEN.

DEPRECIATION. DEDUCTION FOR DEPRECIATION IS GENERALLY ALLOWABLE.

VALIDITY. VALUED POLICIES HAVE BEEN UNIFORMLY HELD TO BE VALID; PROVISION IS OFTENTIMES MADE FOR SUCH POLICIES BY STATUTE.

FRAUD. FRAUD WILL AVOID THE POLICY; GROSS OVER-VALUATION IS PRESUMPTIVE EVIDENCE OF FRAUD, BUT MERE OVER-VALUATION IS NOT.

§ 319. Open or valued policies.

Automobile insurance policies are usually written so that the liability of the insurer is dependent upon the amount of the loss, to be determined after the loss; it is not fixed in the contract, but is left open to be proved by the assured or to be determined by the parties. Such a policy is known as an open policy.

But there are policies wherein the value of the automobile is agreed upon at the time the policy is written. Such a policy is valued. Valued policies fix the value of the automobile and the amount payable in case of total loss, and bind the insurer to pay the whole amount of the policy contract.

This form of policy has been said to be one in which the insurer itself, at the time of making the policy, assesses the damages in case of total loss, unless fraud, inducing an overvaluation on the part of the assured, is established. Deduction for depreciation is generally allowable.[1]

§ 320. Illustrations.

Valuation in "valued policy" of fire insurance on an automobile is conclusive on parties, in the absence of fraud. Where a fire policy recites that the insured automobile is valued at sum insured, it is a valued policy.[2] For example, where an automobile policy definitely stated the value of the machine insured, it was a valued policy and fixed the value insured as a standard in case of total loss notwithstanding the fact that there were provisions in the policy relative to the determination of the loss, the amount to be paid, the right of the company to make repairs, and, in case of dispute between the parties, for arbitration. Such clauses applied only in case the loss was partial.[3]

§ 321. Validity.

Valued policies are usually written in states which have made provision for their use by statutory enactment. They have uniformly been held to be valid and have not been construed to be wagering contracts.[4]

§ 322. Fraud will avoid policy.

Fraudulent valuation of the insured automobile will avoid the policy and defeat recovery. Fraud is not estab-

1. Rosin v. National Fire Ins. Co. (Ill. App.), 17 Ill. Law Rev. Appellate Ct. Dig. 172 (1922); 226 Ill. App. Ct. Rep. 636; See Sunderlin on Fire Insurance, Lecture No. 7, Valued Policies.

2. Lee v. Hamilton Fire Ins. Co., 223 N. Y. S. 441, 130 Misc. Rep. 165 (1927).

3. Hill v. British & Foreign Marine Ins. Co., Ltd., 4 Pa. Dist. & Co. Rep. 9 (1923).

4. Lee v. Hamilton Fire Insurance Co., 223 N. Y. S. 441, 130 Misc. Rep. 165 (1927); Katz v. Royal Insurance Co., 5 Pa. Dist. & Co. Rep. 660 (1925); Hill & British & Foreign Marine Ins. Co., Ltd., 4 Pa. Dist & Co. Rep. 9 (1923); Daggs v. Orient Insurance Co., 136 Mo. 382, 38 S. W. 85.

lished merely by the fact that the property is considerably over-valued, but if the valuation is grossly excessive, it is presumptive evidence of fraud. Gross over-valuation amounts to an affirmative fraud, and will prevent recovery.[5]

§ 323. Construction—Misdescription of age of second-hand automobile a breach of warranty.

In a case involving a valued automobile fire insurance policy, the supreme court of the state of California held that to describe an automobile in a valued policy as having been made in 1909, when in fact it was made in 1907, was such a material misdescription of the thing insured as to constitute a breach of warranty. There was no dispute on the point that, other things being equal, a car two years older had a lesser value. Said the court: "This becomes particularly important in a valued policy, where the insurance company agrees in advance that the property insured is worth the amount for which it is insured, in this case $3,000."[6] Continuing, the California court said: "Such a test of materiality makes the purchase price of a second-hand automobile particularly important in a valued policy, as it must be manifest that an insurance company will not agree to pay $3,000 for the loss of an automobile which cost the insured but $2,500. This is not a case of over-estimating the value of the thing insured, which in an open policy is not necessarily fatal. Here we have the statement of a fact, the price the insured paid for his car. No question of mistaken opinion is involved. Where a valued policy is issued upon the basis of the application alone, as in this case, it is difficult to see what could be more important to the insurer in determining the amount of the policy than positive statements of the year in which the car was built and the price paid for it by the insured."[7]

5. Hoffman v. Prussian National Insurance Company, 181 App. Div. 412, 168 N. Y. S. 841 (1918).

6. Solomon v. Federal Ins. Co., 176 Cal. 133, 167 Pac. 859 (1917).

7. Solomon v. Federal Ins. Co., 176 Cal. 133, 167 Pac. 859 (1917).

§ 324. Three-fourths value. (a) Missouri statute.

The valued policy statute in the state of Missouri provides that in case of total loss of the insured property, the measure of damage shall be the amount for which it was insured, less whatever the depreciation may be in value; in case of partial loss, the measure of damage shall be the proportionate value that the part insured or destroyed bears to the whole property insured, as fixed by the policy. There is also a proviso that no company shall take a risk on any property at a ratio greater than three-fourths of the value of the property insured, and that, when taken, its value is not to be questioned in any proceeding.[8]

§ 325. Three-fourths value. (b) Construed.

Where the state statute provides that property shall not be insured against fire for more than three-fourths of its value, policies written under such statutes are valued. The insurer thereafter is estopped from raising the question that the property was over-insured, and, generally speaking, it is unnecessary for the insured to prove the value in case of total loss. The policy goes no further than to fix the value of the property at the time the policy was issued. The burden is on the assured to prove his loss.[9] But the loss is determined by taking the fixed value at the time the policy was written, and the amount of the policy is three-fourths of that value, and deducting from that amount the depreciation in value of the car to the date of loss.[10]

§ 326. Depreciation—Vexatious refusal to pay.

In a state which has a valued policy law and insurance is written on an automobile as three-fourths of the value of the property insured, it was held proper for the court to

8. Rev. Stats. of Missouri (1919), Sec. 6229, p. 1957.

9. Cohen v. Ft. Dearborn Casualty Underwriters (Mo. App.), 285 S. W. 1024 (1926); Strawbridge v. Standard Fire Insurance Co., 193 Mo. App. 687, 187 S. W. 79 (1916); Sunderlin on Fire Insurance (Lecture on Valued Policies, p. 22).

10. Zackwik v. Hanover Fire Insurance Co. (Mo. App.), 225 S. W. 135 (1920).

instruct the jury in an action on a fire policy for $2,000 that the car was worth $2,666.66 at the time the policy was written, and that the jury should deduct from that sum any amount which they found the car had depreciated in value from the date it was insured to the date it was burned. As there was no excuse for failure of the insured to pay the loss, the jury was justified, under Missouri statute, in allowing the plaintiff attorney's fees and assessing the insurer with a penalty of ten percent for vexatious refusal to pay the loss.[11]

§ 327. Evidence.

Evidence may be introduced showing the diminution in value of the machine from the time of purchase, and such depreciation in value shall be deducted not from the three-fourths value of the car but its full value.[12] Even though no evidence was introduced as to the value of the automobile at the time of the loss, it has been held in a Missouri case that evidence in the case as to full value, depreciation, and general use warranted the finding that the car was worth the three-fourths value stated in the policy.[13] But even though a statute provides that the insured shall be entitled to an allowance of a penalty and attorney fees for vexatious refusal by the insurer to pay the loss, there is no liability for such payment when the insurer refused to pay the full amount of the valued policy in a case where the insured refused to discuss deduction of any amount for depreciation and would not allow any credit for salvage, although the insured admitted the loss was not total.[14]

11. Zackwik v. Hanover Fire Ins. Co. (Mo. App.), 225 S. W. 135 (1920).
12. Strawbridge v. Standard Fire Ins. Co., 193 Mo. App. 687, 187 S. W. 79 (1916).
13. Strawbridge v. Standard Fire Ins. Co., 193 Mo. App. 687, 187 S. W. 79 (1916).
14. Strawbridge v. Standard Fire Ins. Co., 193 Mo. App. 687, 187 S. W. 79 (1916).

§ 328. Appraisal.

Under a valued policy, it is generally held that in case of total loss the policy itself fixes the amount, and an award cannot ignore the valuation fixed in the policy.[15]

§ 329. Pleading and practice. (a) Election.

Where automobile was insured for $1,800 and "valued at the sum insured", insured sought to prove value by evidence. The court held that since the insured elected not to stand on the agreed valuation, but treated the policy as open, he could not change front on appeal and urge that the policy valuation controlled.[16]

§ 330. Pleading and practice. (b) Admission—Total loss.

Where the answer admitted that the insurer issued policy covering automobile against loss by fire and also admitted that such a loss occurred, it was not an admission of total loss by fire.[17]

15. United States Fidelity & Guaranty Co. v. Corbett, 35 Ga. App. 606, 134 S. E. 326 (1926); Elliott v. Fidelity-Phenix Fire Insurance Co. of New York (Mo. App.), 267 S. W. 441 (1924).

16. Hoffman v. Prussian National Ins. Co., 181 App. Div. 412, 168 N. Y. S. 841 (1918).

17. Jarnagin v. Queen Ins. Co. of America (Mo. App.), 272 S. W. 1095 (1925).

CHAPTER XIII.

CANCELLATION.

SECTION.
331. In general.
332. Notice—Cancellation not effective without.
333. Illustration.
334. Notice must be received.
335. When period begins to run.
336. Local agent.
337. Repayment of unearned premium.
338. Waiver.
339. Surrender of policy.
340. Vendor in possession.
341. Termination of policy by mutual consent.
342. Oversight.
343. Mortgagee—Notice.
344. Waiver—Property outside of state.
345. Wrongful cancellation—No right of action against agent.
346. Jury—Evidence.

IN GENERAL. CONTRACT OF AUTOMOBILE INSURANCE CAN ONLY BE CANCELLED IN THE MANNER PROVIDED FOR BY THE POLICY.

NOTICE. IT IS ELEMENTARY THAT THE POLICY CANNOT BE CANCELLED WITHOUT PROPER NOTICE.

REPAYMENT OF UNEARNED PREMIUM. NOTICE OF CANCELLATION WITHOUT TENDER OF UNEARNED PREMIUM IS INSUFFICIENT, IF THE POLICY SO PROVIDES; BUT THE REQUIREMENT MAY BE WAIVED.

SURRENDER OF POLICY. THE RULE IS THAT SURRENDER OF POLICY IS NOT NECESSARY TO MAKE EFFECTIVE A CANCELLATION OF THE POLICY.

§ 331. In general.

The contract of automobile insurance can only be cancelled in the manner provided for by the policy.[1] Pro-

1. American Automobile Ins. Co. v. Watts, 12 Ala. App. 518, 67 So. 758 (1914); Baker v. North River Ins. Co., 112 Kan. 530, 212 Pac. 118 (1923); McDonald v. North River Insurance Co., 36 Idaho 638, 213 Pac. 349 (1923); Maryland v. L. R. Christenson Co., 149 Minn. 65, 182 N. W. 251 (1921); Hutchins v. United States Automobile Ins. Exchange, 170 Minn. 273, 212 N. W. 451 (1927); Phoenix Insurance Co. v. American Trust & Savings Bank (Tex. Civ. App.), 248 S. W. 819 (1923); B. & B. Trucking Inc. v. Home F. &. M.

visions as to cancellation must be strictly complied with by the insurer. The cancellation clause of the policy usually reads: "This policy shall be cancelled at any time at the request of the assured, in which case the company shall, upon demand and surrender of this policy, refund the excess of paid premiums above the customary short rates for the expired time. This policy may be cancelled at any time by the company by giving to the assured a five days' written notice of cancellation with or without tender of the excess of paid premium above the pro rata premium for the expired time, which excess, if not tendered, shall be refunded on demand. Notice of cancellation shall state that said excess premium (if not tendered) will be refunded on demand."

But in states where the old form of policy is in use, the provision for cancellation may provide that "the unearned premium shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate."

§ 332. Notice—Cancellation not effective without.

It is elementary that the policy cannot be legally cancelled unless the insurer has given notice of election to cancel. The notice need not be in any particular form, but is sufficient if distinct and unequivocal. It must show a present cancellation, and not a mere intent to cancel in the future. No affirmative act cancelling the policy is necessary beyond giving the required notice. The cancellation becomes effective on expiration of the period of notice.

§ 333. Illustration.

A company which insures an automobile against fire and theft, in the absence of an agreement with insured to the

Ins. Co. of California, 125 Misc. 312, 209 N. Y. S. 511, aff'd 216 App. Div. 710, 214 N. Y. S. 812, 243 N. Y. 558 (1925); Hall v. Miller (Tex. Civ. App.), 268 S. W. 268 (1925); Snavely v. London Assurance Corp. of London, Eng., 128 Wash. 47, 221 Pac. 611 (1924); Crown Point Iron Co. v. Aetna Ins. Co., 127 N. Y. 608, 28 N. E. 653, 14 A. L. R. 147.

contrary, cannot cancel the insurance policy except as provided by its terms, and where the policy provides for ten days' notice of cancellation, such notice must be given.[2]

§ 334. Notice must be received.

If the notice is sent by mail, and not received, cancellation is not effective.[3]

§ 335. When period begins to run.

The five day period begins to run from the time the notice is received by the assured, and not from the time it was sent by the insurer.[4]

§ 336. Local agent.

Notice to the local agent is insufficient in itself. Where the local agent, upon notice from the company, fails to give notice to the insured as provided for by the policy terms, and return or tender the unearned premium, until after a loss has occurred, the cancellation is ineffective and the insurer is liable.[5] Thus, an agent, who is authorized specially to procure insurance, has no authority to accept notice of or consent to cancellation of the policy, so as to bind the insured by such action.[6]

§ 337. Repayment of unearned premium.

It has been held that notice of cancellation without tender

2. McDonald v. North River Insurance Co., 36 Idaho 638, 213 Pac. 349 (1923).

3. American Automobile Insurance Co. v. Watts, 12 Ala. App. 518, 67 So. 758 (1914); Hutchins v. United States Automobile Ins. Exchange, 170 Minn. 273, 212 N. W. 451 (1927); Crown Point Iron Co. v. Aetna Ins. Co., 127 N. Y. 608, 28 N. E. 653, 14 A. L. R. 147.

4. Hutchins v. United States Automobile Ins. Exchange, 170 Minn. 273, 212 N. W. 451 (1927).

5. Baker v. North River Ins. Co., 112 Kan. 530, 212 Pac. 118 (1923); Perrone v. National Union Fire Ins. Co. (C. P. Alleghany C., Pa.)., 71 Pittsburgh Legal Journal 297 (1923).

6. McDonald v. North River Insurance Co., 36 Idaho 638, 213 Pac. 349 (1923).

of unearned premium is insufficient,[7] if the policy so provides.[8]

But the rule applied in fire insurance cases other than automobile in many jurisdictions is otherwise.[9]

Policy may provide that the unearned premium shall be payable only on surrender of the policy for cancellation. Such a provision is not unreasonable.[10]

§ 338. Repayment of unearned premium—Waiver.

The provision of the policy for return of the premium may be waived. Thus, where the assured having knowledge that the insurer intended to cancel the policy, surrendered it unconditionally for cancellation, cancellation is effective, even though the unearned premium has not been returned.[11] However, the assured has a right to action against the insurer for the amount due.[12] But the assured does not waive his right to contend that notice of cancellation was not sufficient because the insurer failed to tender the unearned premium where he stated at the time of the attempted cancellation that he would return the policy.[14]

§ 339. Surrender of policy.

The rule is that surrender of the policy is not necessary to make effective a cancellation of the policy. Thus, on a policy providing that notice of cancellation should state "that said excess premium (if not tendered) will be re-

7. Washington Rem. Comp. Stat. Sec. 7154; Snavely v. London Assurance Corp., 128 Wash. 47, 221 Pac. 611 (1924).

8. Maltby v. Empire Automobile Insurance Ass'n, 239 Ill. App. 532 (1926); Baker v. North River Ins. Co., 112 Kan. 530, 212 Pac. 530 (1923); Charles J. Hedwall Co. v. Security Mortgage Co. of America, 156 Minn. 289, 194 N. W. 757 (1923).

9. Sunderlin on Fire Insurance, Lecture No. 24, Cancellation, p. 7.

10. Healy v. Stuyvesant Insurance Co., 72 Pa. Super. Ct. 168 (1918).

11. Hancock v. Hartford Fire Insurance Co., 81 Misc. 159, 142 N. Y. S. 352, aff'd 160 App. Div. 927, 145 N. Y. S. 1126 (1913); Buckley v. Citizens' Insurance Co., 188 N. Y. 399, 81 N. E. 165.

12. Buckley v. Citizens Insurance Co., 188 N. Y. 399, 81 N. E. 165.

14. Snavely v. London Assurance Corporation, 128 Wash. 47, 221 Pac. 611 (1924).

funded on demand," notice was insufficient where it stated that the unearned premium "will be subject to your order and paid upon return of the policy," for it did not comply with the terms of the policy.[15]

§ 340. Vendor in possession.

An insurance policy which is made payable to vendor and vendee as their interests may appear, it has been held, cannot be surrendered by the vendor for cancellation without the consent of the insured, although the vendor has possession of the policy.[16]

§ 341. Termination of policy by mutual consent.

An ordinary policy of insurance can always be canceled by mutual agreement between the insured and an authorized agent of the company, and it is immaterial whether the request comes from the insurance company or the insured.[17] Even though an automobile policy provides that it may be cancelled upon written notice within not less than five days, the parties may waive the written notice and cancel the policy by mutual consent and agreement. Thus, where an assured had accidental collision coverage for a truck, upon verbal request of the insurer, the policy was surrendered and the unearned premium was returned. The policy was thereby terminated. Thereafter, the assured had no right of action against the insurer for collision loss to the insured truck, where there was no misrepresentation or fraud, because he had failed to read his policy and did not know that he was entitled to five days' written notice of cancellation.[18]

15. B. & B. Trucking, Inc. v. Home F. &. M. Ins. Co. of California., 125 Misc. 312, 209 N. Y. S. 511, aff'd 216 App. Div. 710, 214 N. Y. S. 812, 243 N. Y. 558 (1925).

16. McDonald v. North River Insurance Co., 36 Idaho 638, 213 Pac. 349 (1923).

17. Ingersoll v. Union Automobile Insurance Co., 17 Ill. Law Rev., App. Ct. Dig. 203 (1922).

18. Hi-Grade Oil & Gas Co. v. United States Fidelity & Gauranty Co., 93 W. Va. 448, 117 S. E. 157 (1923).

§ 342. Oversight.

If by reason of oversight or carelessness, a rider remains attached to a policy which by agreement of the parties should have been cancelled, it will not remain effective. For example, a rider attached to a policy insuring automobile busses provided that one of the busses was not to be covered. Evidence disclosed that it was understood by the parties that rider was to be effective only so long as the buss was not in use. The court held that the rider did not control.[19]

§ 343. Mortgagee—Notice.

A MORTGAGEE OF AN INSURED AUTOMOBILE IS NOT THE "ASSURED" WITHIN THE MEANING OF THE POLICY, TO RECEIVE NOTICE OF CANCELLATION, EVEN THOUGH AUTHORIZED TO KEEP UP INSURANCE.

A mortgagee of an insured automobile is not the "assured," within the meaning of a theft policy so as to receive notice of cancellation.[20] Discussing this question, a Texas court said: "We do not concur in the contention. The bank was not the owner of the automobile, nor does the policy substitute the bank for the assured. Shearman, at any time, could have completely eliminated the bank from any interest whatever which it had in the policy by the payment of the note, and without affecting the policy. The purpose of the policy, and its express provision, was to secure Shearman, the owner of the automobile. The only interest the bank had in the policy was its appointment to receive any money which might become due from the insurance company by reason of loss by theft which Shearman, the mortgagor, might sustain. The contract, as we construe it, is to indemnify the mortgagor against loss, and not a contract to indemnify the mortgagee. The provision in the policy that any loss 'due the assured under this policy

19. Schuylkill Transportation Co. v. London Guarantee & Accident Co., 285 Pa. 91, 131 Atl. 701 (1926).

20. Phoenix Insurance Co. v. American Trust & Savings Bank (Tex. Civ. App.), 248 S. W. 819 (1923).

shall be held payable to American Trust & Saving Bank, as its interest may appear,' does not constitute an assignment thereof to the mortgagee, but rather is an order on the insurance company to pay to the mortgagee an amount equal to its interest in case of loss by theft,—a mere collateral security to the mortgagee for the mortgage debt. To hold that the bank is the 'assured' in the policy would be to do violence to the purpose, intent, and reading of the policy itself, as the policy contract is between the company and Shearman, and expressly names Shearman as the assured, and the reference in the policy to the payment of an amount of money to the bank, as its interest may appear, is but an incident to the main purpose of the policy, sometimes designated a rider, or subsidiary clause to the policy."

The court held that even though the policy authorized the mortgagee bank to keep up the insurance, it could not receive legal notice of cancellation for the assured.[21]

§ 344. Waiver—Property outside of state.

A company financing the re-sale of automobiles entered into a fire contract with an insurer in the state of Ohio which waived the provision relative to cancellation. Statute of the state of Ohio[22] provided that every fire insurance company doing business under the laws of the state of Ohio, which received cash payments of premiums, should insert in every policy so issued a provision that the policy could be cancelled upon the written request of the assured. The court held that the application of the statute was limited to property in the state of Ohio, and that the policy was valid covering property outside of that state. As the New York standard policy, a statutory enactment, contains a cancellation clause, the court stated it would render policies written upon property in New York state subject to cancellation by the assured, but as the Connecticut standard form policy

21. Phoenix Insurance Co. v. American Trust & Savings Bank (Tex. Civ. App.), 248 S. W. 819 (1923).

22. Ohio General Code, Sec. 9577.

may contain provisions adding to or modifying the policy provisions,[23] the policy would be valid as to property in that state.[24]

§ 345. Wrongful cancellation—No right of action against agent.

Where an insurer wrongfully cancels an automobile insurance policy, without giving notice as required by the policy, assured's right of action is not against the agent, but against the insurance company. If the agent gratuitously obtains for the assured a policy in another company for lesser amount, he is under no obligation for the difference.[25]

§ 346. Jury—Conflict of evidence.

In an action involving the question as to whether a rider to an automobile policy providing for collision coverage had been cancelled, where there was a conflict of evidence, it was a question for the jury, and the court erred in directing a verdict for the defendant.[26]

23. Connecticut Gen. Stat., Sec. 3497 (1902).

24. Automobile Insurance Company of Hartford v. Guaranty Securities Corporation, 240 Fed. 222 (1917).

25. Lock v. Neel Co., 84 Pa. Super. Ct. 130 (1924).

26. Drew v. American Automobile Insurance Co. (Tex. Civ. App.), 207 S. W. 547 (1919).

CHAPTER XIV.

INSURER'S LIABILITY.

SECTION.

347. In general.
348. Total Loss.
349. Partial loss.
350. Option to repair.
351. "Repair" or "replace"—Defined.
352. "Suitable repairs and replacements"—Defined.
353. "Actual cost to assured including equipment"—Defined.
354. Exercise of option.
355. New contractual relationship.
356. Unreasonable delay.
357. Insurer's liability reduced.
358. Rights of assignee.
359. Salvage.
360. (a) Right of action.
361. (b) Estoppel.
362. List price.
363. Lien for repairs.
364. Deductible clause.
365. Authority of adjuster.
366. (a) Agent of insurer.
367. (b) Election to repair.
368. Right of recovery—Partner.
369. Interest. (a) Maturity of policy.
370. (b) Sixty days after proof of loss.
371. (c) Unliquidated damages.
372. (d) Michigan statute.
373. Statute supercedes policy condition.
374. Right of action. (a) Fraud.
375. (b) Disaffirmance.
376. (c) Reservation of rights.
377. Pleading.
378. Burden of proof.
379. Special plea.
380. Waiver.
381. Evidence. (a) Expert opinion.
382. (b) Market value.
383. (c) Depreciation.
384. (d) Used car market report.
385. Instruction. (a) Car should be made whole.
386. (b) Depreciation.
387. Jury. (a) Conflict of evidence.
388. (b) Total loss.

MEASURE OF RECOVERY.

TOTAL LOSS. ON AN OPEN OR NON-VALUED POLICY, WHERE THERE HAS BEEN A TOTAL LOSS, THE MEASURE OF DAMAGES IS THE ACTUAL MARKET VALUE OF THE INSURED AUTOMOBILE AT THE TIME LOSS OCCURS.

PARTIAL LOSS. WHERE THE LOSS IS PARTIAL ON SUCH A POLICY, THE MEASURE OF RECOVERY IS THE DIFFERENCE BETWEEN THE ACTUAL MARKET VALUE OF THE INSURED AUTOMOBILE IMMEDIATELY BEFORE AND IMMEDIATELY AFTER THE DAMAGE OR INJURY OCCURS.

§ 347. In general.

The fire, theft and transportation automobile insurance policy usually provides: "This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated accordingly, with proper deduction for depreciation however caused (and without compensation for the loss of use of the property), and shall in no event exceed what it would then cost to repair or replace the automobile or such parts thereof as may be damaged with other of like kind and quality."

§ 348. Total loss.

On an open or nonvalued policy, where there has been a total loss, the measure of damages is the actual market value of the automobile at the time the loss occurs.[1] For example, where a clause in the policy provides that "the association shall not be liable beyond the actual cash value

1. Spivey-Johnson Portrait Co. v. Belt Auto Indemnity Ass'n, 210 Ala. 681, 99 So. 80 (1924); Center Garage Co. v. Columbia Ins. Co., 96 N. J. L. 456, 115 Atl. 401 (1921); Mechanics' Ins. Co. of Philadelphia v. Teat, 34 Ga. App. 361, 129 S. E. 554 (1925); Gibson v. Glens Falls Ins. Co., 111 Neb. 827, 197 N. W. 950 (1924); Hamilton Fire Ins. Co. v. Gregor, 218 App. Div. 536, 218 N. Y. S. 534, rev. on other grounds, 246 N. Y. 162, 158 N. E. 60 (1927); Finn v. Indemnity Co. of America (Mo. App.), 297 S. W. 175 (1927); Campbell v. National Fire Ins. Co. (Mo. App.), 269 S. W. 645 (1924); Southern Casualty Co. v. Landry (Tex. Civ. App.), 266 S. W. 804 (1924); Fidelity Phoenix Fire Ins. Co. v. Oldsmobile Sales Co. (Tex. Civ. App.), 261 S. W. 492 (1924).

of the property destroyed or damaged as of the time of destruction, loss, or damage," recovery was limited to the actual value of the car immediately before the fire.[2] Insurer's promise to unconditionally pay the loss would not increase its liability.[3]

§ 349. Partial loss.

Under an open or nonvalued policy where the loss is partial, the measure of recovery is the difference between the actual market value of the insured automobile immediately before and immediately after the damage or injury occurs.[4]

§ 350. Option to repair.

INSURER MUST EXERCISE OPTION TO REPAIR DAMAGED AUTOMOBILE WITHIN TIME SPECIFIED IN POLICY; OTHERWISE RIGHT IS FORFEITED.

The automobile fire insurance policy usually provides that the insurer shall have the option to repair, rebuild or replace the car, if damaged by fire, by giving notice of its desire to exercise such option within thirty days after the receipt by it of the sworn statement of loss. The insurer must exercise its option within the period specified in the policy, and if it fails to do so, the right is forfeited.[5]

§ 351. "Repair" or "replace"—Defined.

Clause in automobile fire insurance policy providing that

2. Spivey-Johnson Portrait Co. v. Belt Auto Indemnity Ass'n, 210 Ala. 681, 99 So. 80 (1924).

3. Spivey-Johnson Portrait Co. v. Belt Auto Indemnity Ass'n, 210 Ala. 681, 99 So. 80 (1924).

4. Standard Auto Ins. Ass'n v. Reese, 83 Ind. App. 500, 149 N. E. 137 (1925); Jarnagin v. Queen Ins. Co. of America (Mo. App.), 272 S. W. 1095 (1925); Belleview Trading Co. v. International Indemnity Co., 167 Minn. 516, 208 N. W. 994 (1926); Gibson v. Glens Falls Ins. Co., 111 Neb. 827, 197 N. W. 950 (1924); Lummel v. National Fire Ins. Co., 50 S. D. 502, 210 N. W. 739 (1926); Boyle v. Yorkshire Ins. Co., 56 Ont. L. Rep. 564 (1925); Mosrie v. Automobile Ins. Co., —— W. Va. ——, 141 S. E. 871 (1928).

5. Gross v. Germania Fire Ins. Co., 29 Pa. District Ct. 879 (1920).

liability shall not exceed what it would cost to repair or replace automobile or such parts as may be damaged with others of like kind and quality, fixes the measure of liability at what it would cost to repair or replace damaged parts, so as to restore automobile to substantially as good condition as it was in before fire.[6] "Repair" means to restore to sound, good or completed state after injury or partial destruction, and "replace" means to restore or make good.[7]

Construing the clause of the fire and theft policy that the liability of the insurance company shall "in no event exceed what it would then cost to repair or replace the automobile, or such parts thereof as may be damaged, with others of like kind and quality," the Texas court of civil appeals has said: "The limitation in the stipulation placed upon the cost to 'replace' the injured or destroyed parts, if injured to the extent that it practically requires the parts to be 'replaced' with other parts, is the sum of the 'then cost to replace such parts as may be damaged with other parts of like kind and quality.' The words 'of like kind and quality,' do not refer to parts of like age, use, and condition, or present cash value of the parts injured or destroyed by the fire. The words are used as relating to quality and suitableness or fitness for the purposes used. It may be that parts of like age, use, and condition of the injured or destroyed parts are practicably obtainable, and it may be that they are not practicably obtainable. If practicable to use only new parts, and new parts would have to be used, the words and meaning of the stipulation would not forbid it. Consequently, the reasonable cost either to 'repair' or to 'replace' the injury or partial loss with materials of like kind and quality, as fixed by the judgment of the jury, would be accepted as decisive,

6. Automobile Underwriters of America v. Radford (Tex. Civ. App.), 293 S. W. 869, aff'd 299 S. W. 852 (1927).

7. Maryland Motor Car Ins. Co. v. Smith (Tex. Civ. App.), 254 S. W. 256 (1925).

because the insurer's liability is fixed on that agreed basis."[8]

§ 352. "Suitable repairs and replacements"—Defined.

It was held in a Texas case that the term "suitable repairs and replacements", as used in a collision policy, where the insurer had agreed to make such repairs and replacements, or pay the full amount of damages sustained, meant that insurer would restore, or pay the cost of restoring, the car to the condition that would make it equal to what it was before the injury, and that anything less would not be sufficient compensation.[9]

Said the court: "Appellant complains of this definition of 'suitable repairs and replacements.' The specific objection is that, in using the words 'as near as may be possible to the condition,' etc., he placed an undue burden on the defendant, because defendant was only required to restore the car to substantially the same condition it was in before the accident. The injury being one for which the appellant was liable under the terms of the policy, the appellee had the right to claim full compensation for his loss. That loss was the difference between the value of the car before and after the injury. Appellant, in effect, contracted to do all that reasonably could be done to restore the car to its original condition in the way of making repairs and replacements, or to pay the full amount of the damages sustained. The testimony indicates that the principal damage was to the body of the car. Witnesses testified that this could not be restored to its original condition by merely being repaired. It was damaged to the extent that this was impossible, they stated. Appellant contends that it was only required to pay the cost of restoring the car to substantially the same condition it was in before the injury. That is true, if the words 'substantially the same' mean a condition which

8. Maryland Motor Car Ins. Co. v. Smith (Tex. Civ. App.), 254 S. W. 526 (1923).

9. Standard Accident Insurance Co. of Detroit v. Richmond (Tex. Civ. App.), 297 S. W. 879 (1927).

would make the car equal in value to what it was before the injury. Anything less than that would not be adequate compensation for the loss sustained. The use of the word ' possible ' did not, under the facts of this case, require the appellant to do more than it had contracted to do." [10]

§ 353. "Actual cost to assured including equipment"—Defined.

"Actual cost to insured, including equipment", in application for fire insurance on an automobile, means the actual cost of the automobile and the equipment purchased for it, and does not include repairs or new equipment subsequently purchased.[11] But it has been held that the words " actual cost " include cost of replacements and repairs as well as the original cost.[12]

§ 354. Exercise of option.

OPTION TO REPAIR IS NOT DEFEATED BECAUSE INSURED AUTOMOBILE CAN NOT BE PLACED IN AS GOOD CONDITION AS BEFORE INJURY.

Collision policy provided that the insurer had the right to " replace or repair the damaged property or pay for it in money." In the exercise of this option, the insurer offered to repair the injury, but such offer was refused by the assured. The body of the car had been cracked through. The insurer's agent admitted that the car could only be made as good as before the accident by replacement and not by repairs. It was contended by the assured that the option of the policy should be construed to mean that the insurer had the right to do one thing or the other: to pay the damages, or to repair the car as good as before the accident, and not to deliver the assured a car which was not as valuable as the car before the injury, and make up the difference in value, after repaired, with a cash settlement. It was held by a divided court that the insurer hav-

10. Standard Accident Insurance Co. of Detroit v. Richmond (Tex. Civ. App.), 297 S. W. 879 (1927).

11. Standard Auto Assur. Ass'n v. West, 203 Ky. 335, 262 S. W. 296 (1924).

12. Knight v. Hartford Fire Ins. Co., 142 Miss. 382, 107 So. 526 (1926).

ing offered to repair the injured car, the assured could not recover.[13]

§ 355. New contractual relationship.

ELECTION OF INSURER TO REPAIR AND AGREEMENT TO MAKE REPAIRS WITHIN REASONABLE LENGTH OF TIME CREATES NEW CONTRACTUAL RELATIONSHIP.

Under a policy where the automobile was valued at $2,500, the insured car was badly damaged and proof was made for a total loss. The insurer offered to settle the claim for $2,000 or repair the car. The insured then wrote the insurer that if the car was made as good as before the fire, and there was not too much delay, it would be all right. The insurer then advised that arrangements had been made to repair the car and that it was estimated that it would take about four weeks. The insurer thereupon had the car repaired, and at the end of two months tendered it to the insured, free of expense. The insured, in the meantime, had made no protest that too long a time was being taken in the repair of the car. At the end of five months the insured instituted an action against the insurer for the full value of the car. The court held that the election of the insurer to repair the damaged automobile and the agreement to make the repairs within a reasonable length of time created a new contractual relationship between them; that all rights of both parties under the policy had been terminated, and that the insured had no right of action on the policy. The only right of action of either party thereafter was an action for breach of the new contract.[14]

§ 356. Unreasonable delay.

INSURER IS LIABLE FOR UNREASONABLE DELAY IN MAKING REPAIRS AND FOR DEPRECIATION OF THE PROPERTY THROUGH IMPROPER CARE.

13. Sare v. United States Fidelity & Guaranty Co. (N. S.), 50 D. L. R. 573 (1919).

14. Gaffey v. St. Paul F. & M. Ins. Co., 221 N. Y. 113, 116 N. E. 778 (1917), Ann. Cas. 1918B, 1041, rev'g 164 App. Div. 381, 149 N. Y. S. 859 (1914).

The automobile fire policy usually provides that the insurer may pay for the damages, or elect to repair. In case the insurer elects under the policy to repair, it is no longer liable under the policy for the damages, but is liable to the insured for unreasonable delay in making repairs and for depreciation of the property through improper care during repairs.[15] If the car is permitted to stand unprotected from the elements and thereby depreciates in value and the owner is put to expense to place the car in good working condition, the insured is entitled to recover from the insurer for such items of damage.[16]

§ 357. Insurer's liability reduced.

CLAUSE THAT INSURER'S LIABILITY SHOULD "BE REDUCED BY THE AMOUNT OF ANY PROPERTY LOSS OR DAMAGE UNTIL REPAIRS HAVE BEEN COMPLETED OR PARTS REPLACED, WHEN IT SHALL ATTACH FOR AMOUNTS ORIGINALLY WRITTEN" CONSTRUED.

A policy covering collision and fire loss contained a stipulation providing that insurer's liability should "be reduced by the amount of any property loss or damage until repairs have been completed or parts replaced, when it shall attach for amounts originally written." The car had been damaged in a collision and the company had paid the loss. While in a shop undergoing repairs, it was destroyed by fire. What was the insured's measure of recovery? The full loss, less the cost of completing the repairs, or, as the insurer contended, no amount should be allowed for the increased value of the car for repairs, because such repairs had not been completed. The court, in denying the contention of the insurer, said: "We are of the opinion that, from the moment progressive repairs to the car were finally completed and various needed parts were actually replaced, the value of the car was to that extent increased, and the liability of the insurer correspondingly extended until such time as the

15. Letendre v. Auto Ins. Co. of Hartford, Conn., 43 R. I. 410, 112 Atl. 783 (1921).

16. Letendre v. Automobile Ins. Co. of Hartford, Conn., 43 R. I. 410, 112 Atl. 783 (1921).

car was fully restored to the condition in which it was before the collision, at which time the liability would attach for the full amount originally written in the policy. What actually occurred in this case emphasizes the point. The necessary repairs to the body of the car and its fenders were made at one garage. Other repairs were done and needed parts furnished at a second. Each job was a completed transaction, for the cost of which the plaintiff became liable. * * * When, as in this case, all repairs have been made, and all damaged parts to the car have been replaced, and nothing remains to be done but a small part of the work of restoring the car to its former perfect condition, the position of appellants becomes untenable. The fire loss suffered by plaintiff was less than the actual value of the car with repairs actually made and parts replaced. Under these circumstances the most appellants can claim is a *pro tanto* reduction of liability to the extent of the value of any repairs yet to be made, and of parts still to be replaced." [17]

§ 358. Rights of assignee.

WHERE DAMAGED AUTOMOBIE IS STORED BY MORTGAGEE AT REQUEST OF INSURER, IN THE INTERESTS OF ALL PARTIES, ASSIGNEE OF INSURED AND MORTGAGEE CAN ONLY RECOVER VALUE OF CAR IMMEDIATELY BEFORE FIRE, LESS ITS SALVAGE VALUE AFTER THE FIRE, OR IF CAPABLE OF BEING REBUILT, REASONABLE COST OF REPAIRS.

Where the insured car is mortgaged and the insurer, after damage to the car by fire, in the interests of all parties, advised the mortgagee to take care of the car pending proof of loss and adjustment, and the mortgagee thereupon placed the car in storage, an assignee of the insured and mortgagee could only recover the value of the car immediately before the fire less its salvage value after the fire, or if capable of being rebuilt with parts of like material and quality, then the reasonable cost of such repairs.[18]

17. Honey v. Pacific Auto Indemnity Exch., 190 Cal. 336, 212 Pac. 199 (1923).

18. Spivy-Johnson Portrait Co. v. Belt Auto Indemnity Ass'n. 210 Ala. 681, 99 So. 80 (1924).

§ 359. Salvage.

INSURER IS ENTITLED TO SALVAGE WHERE IT ADJUSTS AND PAYS THE LOSS ON THE BASIS OF THE ACTUAL CASH VALUE OF THE INSURED AUTOMOBILE AT THE TIME OF LOSS.

The insurer is entitled to the salvage where it adjusts and pays the loss on the basis of the actual cash value of the automobile at the time of the loss.[19] Thus, where after damage to the insured automobile, the insurer takes possession of and retains the car, it is not entitled to any deduction for salvage in measuring the amount of damages in an action on the policy.[20]

§ 360. Salvage. (a) Right of action.

Where the insurer rejects a valid award by appraisers and fails to exercise an option to pay the damage and leave the salvage, insured's right of action is not lost by failure to tender the salvage to the insurer.[21]

§ 361. Salvage. (b) Estoppel.

The insurer is precluded from defending on the ground that there was a forfeiture because the insured failed to make proof of loss within the specified time, where the insurer had taken possession of the salvage after the loss.[22]

§ 362. List price.

The fire and theft insurance policy provided that the total loss was limited to a percentage of the list price based upon the age of the car, and on the sale price at such percentages, if sold for less than the list price. The court held that the amount of insurance permissible under such a policy did not depend upon the price paid by the assured, who bought it second-hand, but on the age of the car and

19. Stewart v. Haliburton & Freeman, 55 Nova Scotia Rep. 537 (1922).
20. Gibson v. Glens Falls Ins. Co., 111 Neb. 827, 197 N. W. 950 (1924).
21. Hexter v. Equitable F. & M. Ins. Co., 123 Me. 77, 121 Atl. 555 (1923).
22. Yorkshire Ins. Co. v. Craine, 2 A. C. (Eng.) 541, 91 L. J. P. C. N. S. 226, 128 L. T. N. S. 77, 38 Times L. R. 845, 154 L. T. Jo. 167, 66 Sol. Jo. 708, W. C. & Ins. Rep. 216 (1922).

the list price, unless the dealer sold it at less than the factory price. If the car was originally sold by the dealer at less than the factory price, it was incumbent on the insurer to plead and prove the fact.[23]

§ 363. Lien for repairs.

Where a garage keeper agreed to wait for payment for repairs of an automobile until insurance money was collected, no right of lien existed, and the owner was entitled to possession upon completion of the repairs.[24]

§ 364. Deductible clause.

Where a policy provided that "each claim hereunder shall be adjusted separately, and from the amount of each claim, when determined, the sum of twenty-five dollars ($25) shall be deducted, and the company shall be liable for loss or damage in excess of that amount only," which was followed by a provision relating to appraisal and ascertaining the amount of the loss, it was held that the deduction applied not only when an appraisal of loss was made, but also, where suit was instituted. The liability of the insurer, under such policy, was $25 less than the amount of the injury.[25]

§ 365. Authority of adjuster.

In an action on an automobile theft insurance policy which limited the insurer's liability to the actual cost of repairing or replacing the parts damaged or destroyed, an adjuster representing the insurer would have authority to adjust the loss under the terms and conditions of the contract, but he had no implied authority to bind the insurer to pay for putting the insured automobile in as good condition as new, to include the cost of repairs made necessary by wear and

23. Koropchensky v. Goddard (Mo. App.), 266 S. W. 343 (1925).
24. Pezenik v. Greenberg, 157 N. Y. S. 1093 (1916).
25. Stix v. Travelers' Indemnity Co. of Hartford, Conn., 175 Mo. App. 171, 157 S. W. 870 (1913).

tear, and damage by reason of an accident which had occurred prior to the issuance of the policy.[26]

§ 366. Authority of adjuster. (a) Agent of insurer.

Where an adjuster had an injured insured car taken to a garage, secured estimates for cost of repairs, and then had the car transferred to another garage for repairs, it was a reasonable inference that in awarding contract for repairs he was acting for the insurance company.[27]

§ 367. Authority of adjuster. (b) Election to repair.

An insurance adjuster may be found to have elected to repair a stolen car recovered in a damaged condition from evidence that he took possession of it, gave the work to a repairman, and took it from him and employed another to complete it, while the owner never contracted for its repair himself, or authorized, recognized, or ratified such contract.[28]

§ 368. Right of recovery—Partner.

Where a judgment was recovered against a partnership for damages caused by one of the partner's automobiles while being used in the firm's business and such judgment was paid by the partnership, insured partner can recover from the insurance company only the amount of the loss he was compelled to contribute to the fire.[29]

§ 369. Interest. (a) Maturity of policy.

Insured is entitled to interest from date of maturity of policy to the date of judgment.[30]

26. Chisholm v. Royal Ins. Co., Ltd., 225 Mass. 428, 114 N. E. 715 (1917).

27. Councill v. Sun Insurance Office of London, 146 Md. 137, 126 Atl. 229 (1924), 51 A. L. R. 29 (1924).

28. Councill v. Sun Insurance Office of London, 146 Md. 137, 126 Atl. 229, 51 A. L. R. 29 (1924).

29. Steinfield v. Massachusetts Bonding & Ins. Co., 79 N. H. 422, 111 Atl. 303 (1920).

30. Automobile Underwriters of America v. Radford (Tex. Civ. App.), 293 S. W. 869 (1927); See Bulldog Auto Fire Ins. Ass'n v. Brown (Tex. Civ. App.), 287 S. W. 76.

§ 370. Interest. (b) Sixty days after proof of loss.

Where an insurance policy provides that the claim will be paid by the insurance company within sixty days after proper proof of loss, this amount is not due until the expiration of the sixty days, and the insurance company is not liable for interest on this amount until after that time.[31]

§ 371. Interest. (c) Unliquidated damages.

Even though the action is on a fire insurance policy to recover for unliquidated damages, if the damages are capable of ascertainment by computation, and by reason of the property destroyed by fire having a well established market value, the jury may return its verdict for interest on the amount of insured's recovery, dating such interest from the date when the company should have satisfied the claim.[32]

§ 372. Interest. (d) Michigan statute.

Under Michigan statute, an assured who instituted suit on the policy for destruction of the automobile was held to be entitled to interest on the amount recovered from the time when the loss was payable under the terms of the contract, even though no claim was made in the complaint, and no proof was offered.[33]

§ 373. Statute supercedes policy condition.

Missouri statute provides that insurer has the option of repairing or paying for the damages. It controls the policy provision.[34]

31. Fireman's Fund Insurance Co. v. Haley, 129 Miss. 525, 92 So. 635, 23 A. L. R. 1470 (1922); See Bell v. Hanover Fire Ins. Co., 107 Or. 513, 214 Pac. 340, 215 Pac. 171; Home Ins. Co. v. Bennett (Tex. Civ. App.), 9 S. W. (2d) 432; Intermountain Ass'n of Credit Men v. Milwaukee Mechanics' Ins. Co., 44 Idaho 491, 258 Pac. 362.

32. Hartford Fire Ins. Co. v. Bernard, 99 Okla. 44, 221 Pac. 1011 (1924).

33. Baker v. Northern Assurance Co., Ltd. of London, Eng., 214 Mich. 540, 183 N. W. 61 (1921).

34. Offutt v. National Fire Ins. Co. of Hartford, Conn. (Mo. App.), 273 S. W. 161 (1925).

§ 374. Right of action. (a) Fraud.

A compromise and settlement between an insurance company and the owner of an insured automobile cannot be set aside for the fraud of insured in stating the cost of repairs to the damaged car, where the statements were made before the machine was repaired and the insurance company had every opportunity that the insured had to ascertain the extent of the damage and the probable cost of repairs.[35]

§ 375. Right of action. (b) Disaffirmance.

The right of an automobile insurance company to disaffirm a settlement on the ground of fraud is lost to the company where the company expressed no dissatisfaction with the settlement until insured's right of action under the policy had been barred by the two year limitation stated therein.[36]

§ 376. Right of action. (c) Reservation of rights.

In a Quebec (Canada) case the insurer repaired a car, as the policy provided for. The assured was of the opinion that the repairs had been improperly made, and refused to accept the car, and thereupon instituted suit for a total loss. Subsequently, he took back the car, but reserved all his rights. The court held that the form of the action was not changed and that the assured could recover the cost of necessary repairs.[37]

§ 377. Pleading.

INSURER MUST ALLEGE EXERCISE OF OPTION TO REPAIR.

The provision of a policy giving the company the right to suitably repair the automobile insured at its own expense furnishes no defense in the absence of an allegation that

35. Rohrback v. Travelers' Indemnity Co., 278 Pa. 74, 122 Atl. 217 (1923).
36. Rohrback v. Travelers Indemnity Co., 278 Pa. 74, 122 Atl. 217 (1923).
37. Merchants' & Employers' Guarantee & Accident Co. v. Prevost, 35 Quebec K. B. 306 (1923).

the company attempted to exercise the right given by such provision.[38]

§ 378. Burden of proof.

Where suit is brought to recover on an insurance policy covering an automobile, the burden is on the plaintiff to show the value of the car at the time of the loss. Proof of value at the time the policy was issued, without other testimony showing how the car had been used and the condition at the time it was insured, or other facts from which the value of the car at the time of the loss can be ascertained, is insufficient.[39]

§ 379. Special plea.

Collision policy limited the liability of the insurer to the actual cash value of the insured property at the time of the loss or damage. In an action to recover for the cost of repairs, the plaintiff set out the policy, the alleged damage to the truck, and the cost of repairs. The insurance company, by special plea, raised the defense that the value of the truck was less than the repair bill. The court held that the burden of proving the value of the truck was a part of the company's defense, and that the assured's proof was sufficient without testimony as to the value of the car.[40]

§ 380. Waiver.

Where no claim of legal liability was made, insurer did not waive right to control liability by voluntary reimbursement to agent of amount paid for repairs to automobile.[41]

38. General Accident Fire and Life Assurance Corporation, Ltd. v. Ellison (Tex. Civ. App.), 160 S. W. 1141 (1913).

39. Security Insurance Co. of New Haven v. McAlister, 90 Okla. 274, 217 Pac. 430 (1923).

40. Garford Motor Truck Co. v. Miller's National Insurance Co., 230 Ill. App. 622 (1923).

41. Serbinoff v. Wolverine Mut. Motor Ins. Co., 242 Mich. 394, 218 N. W. 776.

§ 381. Evidence. (a) Expert opinion.

It was held that to ask a witness who was a mechanic, whether or not the car required a new body in order suitably to replace and repair car, and his answer that in his opinion it would, under the facts, was not objectionable.[42]

§ 382. Evidence. (b) Market value.

Owner's estimate as to market value of insured car was held to be sufficient, even though somewhat indefinite, where the estimate was greater than the maximum amount of insurance, and there was no contradictory evidence.[43]

§ 383. Evidence. (c) Depreciation.

The amount paid for an insured automobile thirteen months before the loss is incompetent to prove value.[44]

§ 384. Evidence. (d) Used car market report.

It was not error to admit in evidence on the issue as to value of the car a booklet called "The National Used Car Market Report."[45]

§ 385. Instruction. (a) Car should be made whole.

It was not error for the court to instruct that policy required assured should be made whole, where court had further instructed that verdict should be for the fair "market value" of the car.[46]

§ 386. Instruction. (b) Depreciation.

Where the insured automobile was practically new, and

42. Standard Accident Insurance Co. of Detroit v. Richmond (Tex. Civ. App.), 297 S. W. 879 (1927).

43. Hartford Fire Insurance Co. v. Owens (Tex. Civ. App.), 272 S. W. 611 (1925).

44. Whitcomb v. Automobile Ins. Co. of Hartford, 167 Minn. 362, 209 N. W. 27 (1926).

45. Whitcomb v. Automobile Ins. Co. of Hartford, 167 Minn. 362, 209 N. W. 27 (1926).

46. Campbell v. National Fire Insurance Co. of Hartford, Conn. (Mo. App.), 269 S. W. 645 (1925).

the policy provided that the loss shall not exceed what it would cost the insured to repair or replace the same with material of like kind and quality, it was proper for the plaintiff's experts to arrive at the amount of the loss by estimating the cost of the parts necessary to be replaced at their cost when new, without deduction for depreciation.[47] It was not ground for reversal because the trial court permitted the insured to introduce evidence of the value of the insured automobile before and after the fire, even though the policy provided for a different measure of damages, where the insured's experts, testifying as to the amount of the loss in accordance with the theory of the insurer, placed the loss at an amount in excess of the jury's verdict, and stated that then, when repaired, the car would not be in as good condition as before the fire.[48]

§ 387. Jury. (a) Conflict of evidence. Repairs under mistaken belief of liability.

Under mistake as to its liability, an insurer had a car repaired and paid the cost thereof. Thereafter, the insurer instituted suit to recover the amount of the payment, not on the theory of an implied contract, but on the basis of an oral contract. The assured denied such an agreement. The court gave a directed verdict for the plaintiff. But the appellate court held that the trial court was in error for not submitting the issues to the jury, not only because there was conflict of evidence, but because payment in itself was not sufficient to prove defendant's liability. It was incumbent on the insurer to show that the amount was reasonable.[49]

§ 388. Jury. (b) Total loss.

Question whether automobile was a total loss was for the jury.[50]

47. Jones v. Orient Ins. Co., 184 Mo. App., 402, 171 S. W. 28 (1924).
48. Jones v. Orient Ins. Co., 184 Mo. App. 402, 171 S. W. 28 (1914).
49. Travelers' Indemnity Co. v. Mahaney, 87 Pa. Super. Ct. 378 (1926).
50. Jarnagin v. Queen Ins. Co. of America (Mo. App.), 272 S. W. 1095 (1925).

CHAPTER XV.

NOTICE AND PROOF OF LOSS.

SECTION.

389. In general.
390. Notice of loss reasonable and valid.
391. "Forthwith" or "immediate" notice.
392. Illustrations.
393. Proof of loss valid and binding.
394. Condition precedent.
395. Policy requirements.
396. Proof of mailing.
397. Mortgage clause.
398. Time.
399. Waiver and estoppel—In general.
400. (a) Denial of liability on other grounds.
401. (b) Accepting statement and admitting liability.
402. (c) Conduct.
403. (c1) Proof of loss is waived.
404. (c2) Proof of loss is not waived.
405. (d) Agents.
406. (d1) General agent.
407. (d2) Adjuster.
408. (d3) Local agent.
409. (d4) Special agent.
410. False statement—In general.
411. (a) General rule.
412. (b) Illustrations.
413. (c) Exception.
414. (d) Overvaluation.
415. Massachusetts statute.
416. Right of action. (a) Conduct.
417. (b) Waiver—Reservation of rights.
418. (c) Estoppel.
419. (d) Repudiation of agreement.
420. Pleading.
421. Evidence. (a) Notice lost in mails.
422. (b) Previous losses.
423. (c) Letters—Waiver.
424. (d) Agency.
425. (e) Other insurance—Cars permitted to burn.
426. (f) Erroneous answer in proof of loss.
427. Burden of proof.
428. Jury. (a) Conflict in evidence.
429. (b) Waiver.
430. Non-suit.

SECTION.
431. Finding.
432. Penalty and damages.
433. Appeal and error.

§ 389. In general.

The fire and theft automobile insurance policy approved by the National Convention of Insurance Commissioners,[1] provides that "in the event of loss or damage the assured shall give forthwith notice thereof in writing to this company, and within sixty (60) days after such loss, unless such time is extended in writing by this company, shall render a statement to this company signed and sworn to by the assured, stating the place, time and cause of the loss or damage, the interest of the assured and of all others in the property, the sound value thereof and the amount of loss or damage thereon, all encumbrances thereon, and all other insurance whether valid or not covering said property; and the assured, as often as required, shall exhibit to any person designated by this company, all that remains of the property insured and submit to examinations under oath by any person named by this company, and subscribe the same; and as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made."

§ 390. Notice of loss reasonable and valid.

The conditions of a fire and theft automobile insurance policy requiring insured to give the company forthwith written notice of loss or damage are reasonable and valid.[3]

But even though the automobile fire insurance policy contains the provision for immediate written notice of loss and

1. National Convention of Insurance Commissioners, December, 1919, meeting in New York.

3. Falls City Plumbing Supply Co. v. Potomac Ins. Co., 193 Ky. 734, 237 S. W. 376 (1922).

the further provision that the policy will be void if proof of loss is not submitted within 60 days, where immediate written notice is not given the policy will not be avoided.[4]

§ 391. "Forthwith" or "immediate" notice.

WHERE IT IS PROVIDED IN AN AUTOMOBILE INSURANCE POLICY THAT IN THE EVENT OF LOSS OR DAMAGE THE ASSURED SHALL GIVE "FORTHWITH" OR "IMMEDIATE" NOTICE THEREOF IN WRITING TO THE COMPANY, THE TERM "FORTHWITH" OR "IMMEDIATE" DOES NOT MEAN INSTANTLY, BUT WITHIN A REASONABLE TIME.

The term "forthwith" as contained in the provision that "in the event of loss or damage the assured shall give forthwith notice thereof in writing to this company," does not mean instantly, but that the assured in the exercise of due diligence, will give notice within a reasonable length of time.[5]

The provision requiring the giving of "immediate notice" should be liberally construed, and means that notice must only be given within a reasonable time under the circumstances of each particular case. If the assured acts with due diligence and without unnecessary and unreasonable delay, the requirement will be met.[6]

The question of what is a reasonable time is usually one for the jury to determine,[7] unless the lapse of time is so long that it is obviously a non-compliance with the contract.[8]

4. Zackwik v. Hanover Fire Ins. Co. (Mo. App.), 225 S. W. 135 (1920).

5. Gallagher v. American Alliance Ins. Co. of New York (1921), 220 Ill. App. 476 (theft); Northwestern Nat. Ins. Co. v. Cohen, (1914), 138 Va. 177, 121 S. E. 507 (theft).

6. Stanilov v. Lincoln Mutual Casualty Co. (Ill. App.), 19 Ill. Law Rev. App. Ct. Dig. 18 (1924).

7. Northwestern National Ins. Co. v. Cohen, 138 Va. 177, 121 S. E. 507 (1924); Falls City Plumbing Supply Co. v. Potomac Ins. Co., 193 Ky. 734, 237 S. W. 376 (1922); Sunderlin on Fire Insurance (Lecture No. 26, Requirements in Case of Loss, p. 4).

8. Northwestern National Ins. Co. v. Cohen, 138 Va. 177, 121 S. E. 507 (1924).

§ 392. Illustrations.

It has been held that the policy requirement as to notice was reasonably and substantially complied with where the assured sent the notice by registered mail to the insurer seventeen days after the car disappeared.[9] It has also been held that where a car disappeared on a Saturday night and its loss was not reported until the following Monday morning, the question whether the provision of the policy as to giving notice had been properly complied with was for the jury to determine.[10] The court held it was a question for the jury where notice was given within four days from the time the machine was stolen, and the notice was received by the company within five days.[11]

§ 393. Proof of loss valid and binding.

UNDER PROVISION OF AUTOMOBILE INSURANCE POLICY REQUIRING ASSURED, WITHIN SIXTY DAYS AFTER LOSS, UNLESS SUCH TIME IS EXTENDED IN WRITING, TO RENDER STATEMENT TO THE INSURANCE COMPANY, SIGNED AND SWORN TO BY THE ASSURED, STATING THE PLACE, TIME AND CAUSE OF THE LOSS OR DAMAGE, ETC., PROOF OF LOSS IS A CONDITION PRECEDENT TO THE RIGHT OF RECOVERY ON THE POLICY.

The provisions of the automobile fire insurance policy that the assured shall furnish proofs of loss within 60 days of the date of loss, and the further condition of the policy that a failure to submit such proofs of loss shall avoid the policy, are valid and binding, and failure to submit proofs of loss within the required period will prevent a recovery by the assured, unless such provisions are waived by the company, or by some authorized agent for the company.[12]

9. Southern Casualty Co. v. Landry (Tex. Civ. App.), 266 S. W. 804 (1924).

10. Northwestern National Ins. Co. v. Cohen, 138 Va. 177, 121 S. E. 507 (1924).

11. Falls City Plumbing Supply Co. v. Potomac Ins. Co., 193 Ky. 734, 237 S. W. 376 (1922).

12. Metcalf v. National Union Fire Ins. Co., 29 Ga. App. 590, 116 S. E. 324 (1923); Travelers' Ins. Co. v. Plaster, 210 Ala. 607, 98 So. 909; Sininerope v. Hartford Fire Ins. Co., 207 App. Div. 114, 201 N. Y. S. 615; American Ins. Co. v. Ott, 101 Okla. 111, 223 Pac. 131; Caracuzzo v. Orient Ins. Co. Hartford, Conn., —— R. I. ——, 141 Atl. 309 (1928).

§ 394. Condition precedent.

Under the provision of the automobile insurance policy that "within sixty (60) days after such loss, unless such time is extended in writing by this company," the assured "shall render statement to this company signed and sworn to by the assured, stating the place, time and cause of the loss or damage, the interest of the assured and of all others in the property, the sound value thereof and the amount of loss or damage thereon, all encumbrances thereon, and all other insurance whether valid or not covering said property," etc., proof of loss is a condition precedent to the right of recovery on the policy.[13]

It has been held in an Arizona case that failure to make proof in the sixty day period does not void the policy, but merely postpones the time of bringing suit. However, notice must be given, proof filed, and suit brought within the period required in the policy for instituting the action.[14]

But it has been held in a Nevada case that proof of loss is not a condition precedent to recovery.[15]

§ 395. Policy requirements.

The proof of loss satisfies the requirement of the policy

13. ARKANSAS—Smith v. Globe & Rutgers Fire Ins. Co., 174 Ark. 346, 295 S. W. 388 (1927).

GEORGIA—Metcalf v. National Union Fire Ins. Co., 29 Ga. App. 590, 116 S. E. 324 (1923); Folds v. Firemen's Fund Ins. Co., 28 Ga. App. 323, 110 S. E. 925 (1922).

ILLINOIS—Gallagher v. American Alliance Ins. Co., 220 Ill. App. 476 (1921).

IOWA—Hessen v. Iowa Auto Mut. Ins. Co., 195 Iowa 141, 190 N. W. 150 (1922).

MASSACHUSETTS.—Shapiro v. Security Ins. Co., 256 Mass. 358, 152 N. E. 370 (1926).

NEW YORK—Sininerope v. Hartford Fire Ins. Co., 201 N. Y. S. 615, 207 App. Div. 114.

UNITED STATES—Bank of South Jacksonville v. Hartford Fire Ins. Co., 1 Fed. (2nd) 43 (1924).

14. North British & Mercantile Ins. Co., Ltd. v. San Francisco Securities Corp., 30 Ariz. 599, 249 Pac. 761 (1926).

15. Clark v. London Assur. Corp., 44 Nev. 359, 195 Pac. 809 (1921).

where it states the time, place and cause of damage to the car, but does not state that the taking constitutes a theft.[16]

§ 396. Proof of mailing.

There is no presumption of receipt of proofs of loss in the mail in due course, unless it affirmatively appears that the letter was duly stamped and deposited in the mail.[17]

§ 397. Mortgage clause.

There is but one proof of loss required, even though the policy contains a mortgage clause. Thus, on a theft policy, where proof of loss had been submitted by the mortgagee, the insurer was not entitled to an additional and separate proof of loss by the mortgagor.[18]

§ 398. Time.

TIME OF FILING PROOF BEGINS TO RUN FROM DATE OF FIRE OR THEFT, AND NOT FROM DISCOVERY BY ASSURED.

The rule is recognized by courts in leading jurisdictions that the stipulation of the automobile fire and theft insurance policy that proof of loss must be submitted "within sixty days of the date of loss" requires the assured to submit proof within sixty days from the time of the fire or theft, and not within such times from date that assured acquires knowledge thereof.[19]

WAIVER AND ESTOPPEL.

PROVISION IN AUTOMOBILE INSURANCE POLICY FOR NOTICE AND PROOF OF LOSS IS INSERTED FOR BENEFIT OF INSURER, AND IT MAY BE WAIVED.

16. Boyle v. Yorkshire Ins. Co. (1925), 56 Ont. L. Rep. 567.

17. Glaser v. Williamsburg City Fire Ins. Co., 72 Ind. App. 319, 125 N. E. 787 (1920).

18. Thompson v. National Fire Ins. Co. of Hartford, Conn., 48 S. D. 224, 203 N. W. 464 (1925).

19. Neal, Clark & Neal Co. v. Liverpool, London & Globe Ins. Co., 178 App. Div. 730, 165 N. Y. S. 204 (1917); Metcalf v. National Union F. Ins. Co., 29 Ga. App. 590, 116 S. E. 324 (1923).

THE INSURER WAIVES NOTICE AND PROOF OF LOSS, WHERE:—
(a) IT DENIES LIABILITY ON GROUNDS OTHER THAN THAT OF THE INSUFFICIENCY OF PROOF OF LOSS;
(b) IT ACCEPTS STATEMENT OF LOSS WHICH ASSURED FURNISHES AS SUFFICIENT, AND ADMITS LIABILITY.
(c) INSURER'S CONDUCT, DURING PERIOD FOR FILING PROOF OF LOSS, REASONABLY INDUCES INSURED TO BELIEVE THAT SETTLEMENT WILL BE MADE WITHOUT FILING SUCH PROOF, AND ASSURED, ACTING ON SUCH BELIEF, FAILS TO COMPLY WITH SUCH REQUIREMENT.
(d) INSURER'S AGENT, ACTING WITHIN APPARENT SCOPE OF HIS AUTHORITY, WAIVES PROOF OF LOSS.

§ 399. Waiver and estoppel—In general.

Requirement of automobile insurance policy as to furnishing proof of loss is a provision that is inserted in the policy for the benefit of the insurer and may be waived by the acts of the insurer or its duly authorized agents.[20]

§ 400. Waiver and estoppel. (a) Denial of liability on other grounds.

Proof of loss is not required under automobile insurance policy where the insurer, after the loss, denies that it has ever issued such a policy.[21]

If insurer denies liability on other grounds than that of failure to submit or insufficiency of proofs of loss, it waives such proofs.[22]

Where the insurer denies liability and its refusal to pay is not predicated on the failure of the assured to furnish proof of loss, such conduct of the insurance company constitutes a waiver of the provision of the policy requiring proof of loss.[23]

20. Reeves v. National Fire Insurance Co. of Hartford, 41 S. D. 341, 170 N. W. 575.
21. Fodor v. National Liberty Ins. Co. of America, 175 N. Y. S. 112 (1919).
22. Rosenberg v. Maryland Casualty Co., 3 N. J. Misc. 1132, 130 Atl. 726 (1925).
23. Shapiro v. Security Ins. Co. (theft), 256 Mass. 358, 152 N. E. 370 (1926); Fidelity Phoenix Ins. Co. of New York v. Oldsmobile Sales Co. (Tex. Civ. App.), 261 S. W. 492 (1924).

Thus, where the assured had given verbal notice of the loss and the insurer appointed an adjuster to investigate, who made a written report denying liability on a theft policy because the car did not contain a certain lock, there was a waiver of the defense that the assured had failed to make proof of loss, as also, there was a waiver of all other defenses except the one specified.[24]

So, where insured gave the agents who issued his automobile theft insurance policy notice that his automobile had been stolen and accompanied by an employee of such agents he went to see the adjuster, and the adjuster denied the claim, there was a waiver of the insured's failure tomake proof of loss in accordance with the terms of the policy, and the insured because of such failure was not precluded from recovery.[25]

Where the insured notified insurer in writing of the loss or disappearance of an automobile, and within sixty days from the date of the loss, insurer denied liability on the ground that its policy did not cover embezzlement or wrongful conversion, the insurer waived proof of loss.[26]

§ 401. Waiver and estoppel. (b) Accepting statement and admitting liability.

Further proof of loss is waived by the insurer when it retains a "sworn report of total loss" without objection.[27]

Insurer has been held to have waived provision of policy requiring proof of loss within sixty days by requesting affidavit of ownership, power of attorney to get possession of car, request for meeting with insured and consideration of offer of settlement.[28]

24. Carroll v. Union Marine Ins. Co. Ltd of Liverpool (Mo. App.), 249 S. W. 691 (1923).

25. Bird v. St. Paul F. & M. Ins. Co., 218 Mich. 266, 187 N. W. 265 (1922).

26. Buxton v. International Indemnity Co., 47 Cal. App. 583, 191 Pac. 84 (1920).

27. Rosin v. National Fire Ins. Co. (Ill. App.), 17 Ill. Law Rev. (App. Ct. Dig.) 172 (1922).

28. Campbell v. National Fire Ins. Co. (Mo. App.), 269 S. W. 645 (1924).

It was held in a Montana case that insurer waived its right to question insured's notice of confiscation of car for violation of prohibition laws and proof of loss, by admitting liability on policy for over a year while it was engaged in investigating the facts of the loss.[29]

But settlement by an insurer under a fire policy with the mortgagee of the insured automobile, about eight months after a loss, is not a waiver of the requirement of proof of loss within sixty days by the owner or mortgagor.[30]

§ 402. Waiver and estoppel. (c) Conduct.

Conduct of the insurer's agents may be such as to constitute waiver of the provision of the policy for submitting proof of loss.[30a]

29. Midland Motor Co. v. Norwich Union Fire Ins. Co., 72 Mont. 583, 234 Pac. 482 (1925).

30. Glaser v. Williamsburg City Fire Ins. Co., 72 Ind. App. 319 125 N. E. 787 (1921).

30a ARKANSAS—National Fire Ins. Co. v. Crabtree, 151 Ark. 561, 237 S. W. 79 (1922).

ILLINOIS—O'Connor v. Maryland Motor Car. Ins. Co., 287 Ill. 204, 122 N. E. 489, 3 A. L. R. 787 (1919).

INDIANA—National Fire Ins. Co. v. Gellman, 83 Ind. App. 219, 144 N. E. 154 (1924).

IOWA—Lozier Auto. Exch. v. Interstate Casualty Co., 197 Iowa 935, 195 N. W. 885 (1924).

MARYLAND—Continental Ins. Co. v. Burns, 144 Md. 429, 125 Atl. 232 (1924).

MASSACHUSETTS—Shapiro v. Security Ins. Co., 256 Mass. 358, 152 N. E. 370 (1926).

MICHIGAN—Stone v. American Mut. Auto. Ins. Co., 213 Mich. 194, 181 N. W. 973 (1921); Douglas v. Ins. Co. of N. A., 215 Mich. 529, 184 N. W. 539 (1921).

MISSOURI—Campbell v. National F. Ins. Co. (Mo. App.), 269 S. W. 645 (1924).

NEW YORK—Hessler v. North River Ins. Co., 211 App. Div. 595, 207 N. Y. S. 529 (1925); Callahan v. L. & L. Fire Ins. Co., Ltd., 98 Misc. 589, 163 N. Y. S. 322, aff'd 179 App. Div. 890, 165 N. Y. 1079.

NEW JERSEY—Rosenberg v. Maryland Casualty Co., 3 N. J. Misc. 1132, 130 Atl. 726 (1925).

OKLAHOMA—Security Ins. Co. of New Haven v. McAlister, 90 Okla. 274, 217 Pac. 430 (1923); American Ins. Co. v. Ott, 101 Okla. 111, 223 Pac. 131

§ 403. Waiver and estoppel. (c) Conduct. (c1) Proof of loss is waived.

Requirement for proof of loss is waived by the insurer by its conduct during the period of time for filing proof of loss which reasonably induces insured to believe that settlement will be made without filing such proof, where insured, acting on such belief, fails to comply with such requirement.[31] Insurer may be estopped by lulling insured into the belief that formal proof will not be required.[31a]

The provision requiring proof of loss is waived (a) where insurance company, by its acts and those of its attorney in answering insured that claim for automobile stolen would be paid, induced insured to refrain from bringing suit on automobile theft policy within a year;[32] (b) where the agents of the insurer misled the insured, who furnished a written statement of his loss, believing that no further proof was necessary;[33] (c) where the insurer denies all liability and the insured relying on such denial omits to file proofs of loss;[34] and (d) where the insurer receives and retains proof of loss without objection to the insufficiency thereof.[35]

(1924); Springfield F. & M. Ins. Co. v. Booher, 102 Okla. 89, 226 Pac. 1028 (1924).

RHODE ISLAND—W. P. Hamblin Inc. v. Newark Fire Ins. Co., 48 R. I. 473, 139 Atl. 212.

SOUTH DAKOTA—Sawyer v. National Fire Ins. Co., —— S. D. ——, 220 N. W. 503 (1929).

TEXAS—Webber v. Fidelity Lloyds of America (Tex. Civ. App.), 271 S. W. 118 (1925); Franklin Fire Ins. Co. v. Britt (Tex. Civ. App.), 254 S. W. 215 (1923).

31. Brown v. Firemen's Ins. Co., 106 Neb. 615, 184 N. W. 88; Firemen's Ins. Co. of Newark v. Rye, 160 Ark. 212, 254 S. W. 465 (1923).

31a. Alliance Ins. Co. et al. v. Enders, (9th Cir. U. S. C. C. A.), 293 Fed. 485.

32. W. P. Hamblin Inc. v. Newark Fire Ins. Co., 48 R. I. 473, 139 Atl. 212 (1927).

33. Walton v. American Central Ins. Co. of St. Louis, 115 Wash. 103, 196 Pac. 588.

34. Russell v. Granite State F. Ins. Co., 121 Me. 248, 116 Atl. 554; Aetna Ins. Co. v. Indiana Nat. Life Ins. Co., 191 Ind. 554, 133 N. E. 4; Springfield F. &. M. Ins. Co. v. Donahoe, 87 Okla. 78, 209 Pac. 442.

35. Snell v. North British & Mercantile Ins. Co. of London and Edinburgh, 61 Mont. 547, 203 Pac. 521.

If the acts of the insurer show an intention to relinquish the right of forfeiture for failure to make proof of loss, they will be held to constitute a waiver, even though in such cases the facts are not sufficient to constitute an estoppel.[36]

Even though proof of loss of another car under the same policy, and under the same circumstances, has been lost, and the assured is requested to make out another, it is sufficient.[37]

Immediate notice of loss is waived where the insurer's agent in frequent conversations with the assured advised him that the company was investigating the case, and there was no denial of liability on the ground that notice was not given as required by the policy.[38]

There was a sufficient compliance with the requirement as to proof of loss where the assured immediately after the theft of his automobile filed with the insurer's agent a "notice of lost," gave to the agent on a blank form all the information pertaining to the loss, and the agent in reply to a question advised assured that he had done all that was required of him; proof of loss was not submitted, but the insurer thereafter investigated the loss.[39]

Where the insurer's agent advised the insured that his proof of loss was sufficient, even though it was not sworn to, as required by the policy, the insurer will not be permitted to take advantage of such a situation and thereby deny liability on the ground that proper proof was not submitted.[40]

Where the assured immediately after discovery of the loss of his car under a theft insurance policy notifies the insurer's agent, and thereafter the agent and the adjuster

36. Security Ins. Co. of New Haven v. McAlister, 90 Okla, 274, 217 Pac. 430 (1923).

37. Lozier Auto. Exch. v. Interstate Casualty Co., 197 Iowa 935, 195 N. W. 885 (1924).

38. Stone v. American Mut. Auto. Ins. Co., 213 Mich. 194, 181 N. W. 973 (1921).

39. American Ins. Co. v. Ott, 101 Okla. 111, 223 Pac. 131 (1924).

40. O'Connor v. Maryland Motor Car. Ins. Co., 287 Ill. 204, 122 N. E. 489, 3 A. L. R. 787 (1919).

for the company make a thorough investigation, and both the agent and the adjuster advise the assured that he has done everything that is required of him, the court said in such a case, that the assured was "lulled into security," the insurer had all the information that could have been obtained from a formal proof of loss, and the requirement was waived.[41]

Where the assured turned over to an agent of the company a detailed report of the circumstances surrounding the loss of the car, about a month and a half after the loss occurred, and the agent prepared a formal proof of loss, which was turned over to the company's adjuster, without stating the date of the theft, there was a sufficient compliance with the provision of the policy that proof of loss should be made within thirty days after the discovery of the loss of the car.[42]

Where the insurance company refuses to arbitrate in accordance with the terms of its fire insurance policy and refuses to submit to partial arbitration, it thereby waives notice of loss.[43]

Where the policy provided that it would be void if the assured failed to submit proof of loss within sixty days, and subsequent to that time proof was filed, the insurer investigated the loss, requested and obtained from the assured an affidavit of ownership and power of attorney, and thereafter made an offer of settlement, the provision was waived, even though the assured had at the time made an assignment of his rights under the policy.[44]

41. Springfield F. &. M. Ins. Co. v. Booher, 102 Okla. 89, 226 Pac. 1028 (1924).

42. Lozier Auto. Exch. v. Interstate Casualty Co., 197 Iowa, 935, 195 N. W. 885 (1923).

43. Wilson & Toomer Fertilizer Co. v. Auto. Ins. Co. (U. S. D. C.), 283 Fed. 501.

44. Campbell v. National F. Ins. Co. (Mo. App.), 269 S. W. 645 (1924).

§ 404. Waiver and estoppel. (c) Conduct. (c2) Proof of loss is not waived.

The provision of the automobile insurance policy for making proof of loss within sixty days is not waived by the assured filing proof of loss after the required time, without being requested to do so by the insurer.[45]

It has been held in Massachusetts that the insurer does not waive its right to a proof of loss by requiring insured to be examined under oath, nor by having its agents investigate the loss to ascertain whether an agreement as to the amount may be made, and, if not, to have the matter referred.[46]

Where automobile fire insurance policy provided that its conditions could not be waived by agent of the company, it was held in a Massachusetts case insured could not recover on theory of waiver of requirement for sworn statement of loss within sixty days because insurer's attorney stated to the insured that he would be notified in time to come down and swear to statement of loss.[47]

Waiver of proof of loss cannot be shown by the fact that a local agent of the insurer declined to pay the loss, or because the insurer's agent took charge of the burned automobile for the benefit of all parties concerned.[48]

Mere delay in negotiations for a settlement which neither deceives or misleads the insured will not work an estoppel.[49]

On an automobile liability insurance policy, where counsel for the company told assured, after notice of an accident that he would endeavor to be present at a hearing of the injured party's case before the industrial accident commission, and that he thought they were attempting to put

45. Webber v. Fidelity Lloyds of America (Tex. Civ. App.), 271 S. W. 118 (1925).

46. Shapiro v. Security Ins. Co., 256 Mass. 358, 152 N. E. 370 (1926).

47. Paulauskas v. Fireman's Fund Ins. Co., 254 Mass. 1, 149 N. E. 668 (1926).

48. Northern Assurance Co. v. Pate, 29 Ga. A. 90, 114 S. E. 69 (1922).

49. Gordon v. Insurance Co. of North American (Pa.), 79 Legal Intelligencer 338.

one over on him, there was no waiver of the provision of the policy requiring immediate notice of the accident, where assured had already forfeited his rights under the policy by failing to give immediate notice, not having been influenced to the prejudice of any such right.[50]

§ 405. Waiver and estoppel. (d) Agents.

AGENTS ACTING WITHIN THE APPARENT SCOPE OF THEIR AUTHORITY CAN WAIVE PROOF OF LOSS.

Agents acting within the apparent scope of their authority can waive proof of loss. An agent of an insurer who has authority to countersign and issue policies, to collect and transmit premiums, to deliver drafts in settlement of loss claims, and to take proof of loss is such an agent as has authority to waive proof of loss.[51]

§ 406. Waiver and estoppel. (d) Agents. (d1) General agent.

In absence of notice of restriction limiting the authority of agent to waive compliance with policy conditions, a general agent has apparent authority to waive provision that notice of loss shall be written and to substitute oral notice by words or conduct signifying that he accepted it as sufficient.[52]

§ 407. Waiver and estoppel. (d) Agents. (d2) Adjuster.

It is within the apparent scope of the authority of an adjuster, who has been appointed to investigate and adjust a loss, to waive proofs of loss and to agree upon the amount of the loss. In the absence of evidence of actual authority of an adjuster, it is to be assumed that he has the power to waive proof of loss and to bind the company in ascertaining the amount of the loss and adjusting the cost of repairing it. This is true even where the policy contains a provision

50. Lewis v. Commerical Casualty Ins. Co., 142 Md. 472, 121 A. 259 (1923).
51. Sawyer v. National Fire Ins. Co. (S. D.), 220 N. W. 503 (1929).
52. Weatherwax v. Royal Insurance Co., 250 N. Y. 281, 165 N. E. 293 (1929), rev. 228 N. Y. S. 919 (1928).

that no clause shall be waived except by writing indorsed thereon; for such a provision does not preclude the insurer from thereafter authorizing a waiver in some other way.[53]

Proof of loss was waived where under an automobile theft insurance policy the assured notified the insurer's adjuster of the loss, showed him his policy and papers, and informed him concerning the loss, and the adjuster notified the insured that within sixty days the company would either return the car or pay him for its loss.[54]

Where written proof of loss was not made until ninety-eight days after the date of the theft of the car, but the insurer, having notice of the theft at the time, proceeded to make an investigation to recover the car, and the assured was advised by the adjuster for the company to wait sixty days before making an adjustment, there was a waiver of the provision of the policy requiring submission of proof within the sixty day period.[55]

Where before period for submitting proof of loss has expired, an agent and adjuster of the insurer enters into negotiations with the insured for a settlement, and both of them lead the insured to believe that a settlement is to be made, such conduct of the insurer's agents constitutes a waiver of the provision of the policy for proof of loss.[56] But an independent adjuster who is employed by the insurer to try and reach an agreement with the assured as to the amount of loss does not have general or special authority to bind the company definitely as to the amount that shall be payable. In a Massachusetts case, the amount agreed upon between the adjuster and assured was submitted to the company for its written approval, which was never given. As the policy provided that no representative of the company would have power to waive any of its terms,

53. Shapiro v. Security Ins. Co. (theft), 256 Mass. 358, 152 N. E. 370 (1926); Rosenberg v. Maryland Casualty Co., 3 N. J. Misc. 1132, 130 Atl. 726 (1925).

54. Douglas v. Ins. Co. of N. A., 215 Mich. 529, 184 N. W. 539 (1921).

45. Franklin F. Ins. Co. v. Britt (Tex. Civ. App.), 254 S. W. 215 (1923).

56. Firemen's Ins. Co. of Newark v. Rye, 160 Ark. 212, 254 S. W. 465 (1923).

unless such waiver was written upon or attached to the policy, the court held there had been no waiver on the part of the insurer for filing proof of loss.[57] Where the evidence showed that the insurer's adjuster examined the insured automobile soon after the fire and prepared a written statement, which was signed and verified by the insured, it was a question for the jury whether the conduct of the insurer's adjuster was such as to constitute a waiver of the provision of the policy for submitting formal proof of loss.[58] But there is no waiver of proof of loss where an adjuster's offer of settlement is rejected.[59]

§ 408. Waiver and estoppel. (d) Agents. (d3) Local agent.

INSURER'S LOCAL AGENT, AS A GENERAL RULE, HAS NO AUTHORITY TO WAIVE PROOF OF LOSS.

EXCEPTION. BUT WHERE THE LOCAL AGENT HAS POWER TO EFFECT INSURANCE, COUNTERSIGN POLICIES, COLLECT PREMIUMS AND ADJUST LOSSES, EVEN THOUGH SMALL, HE HAS APPARENT AUTHORITY TO WAIVE PROOF OF LOSS.

The soliciting agent has limited authority. His duty is discharged in placing the business, and his authority usually ends there. But the local agent oftentimes has general authority. If the local agent has authority to effect insurance, countersign policies, collect premiums, it has been held his apparent authority is sufficient to adjust losses and waive proof of loss.[60]

If the insurer's local agent has authority to adjust small losses, it is sufficient to create apparent authority to adjust all losses and waive proof of loss.[61] So, in an Arkansas case, where the insurer's local agent apparently having such general authority promised the assured that he would look after the matter of a theft of the insured automobile and would see that the policy was paid unless the car was found

57. Gormley v. Westchester Fire Ins. Co., 256 Mass. 221, 152 N. E. 320 (1926.)

58. Bott v. Westchester Fire Ins. Co., 218 Mich. 376, 188 N. W. 334 (1922).

60. National Fire Ins. Co. v. Crabtree, 151 Ark. 561, 237 S. W. 97 (1922).

61. National Fire Ins. Co. v. Crabtree, 151 Ark. 561, 237 S. W. 97 (1922).

in sixty days, lulled the insured into a feeling of security and thereby induced him not to make proof of loss, there was a waiver of proof.[62]

But there was no waiver of proof of loss by the statement of an employee of the local agent to the assured within the sixty day period, that there was nothing more required of him, and there is no waiver of the provision because, after the expiration of the sixty day period, the assured files with the insurer and the insurer retains a paper which the assured claimed was proof of loss.[63]

§ 409. Waiver and estoppel. (d) Agents. (d4) Special agent.

Special agent acting within the apparent scope of his authority may waive provision of theft insurance policy for submitting proof of loss within sixty day period, even though a local agent could not. But if the evidence is conflicting, it is a question for the jury.[64]

FALSE STATEMENT.

FALSE STATEMENT IN REGARD TO MATERIAL MATTER, IN PROOF OF LOSS, MADE WILFULLY AND KNOWINGLY, WITH INTENT TO CHEAT AND DEFRAUD THE INSURER, AND IN ORDER TO PROCURE PAYMENT OF LOSS, VOIDS THE POLICY WHERE IT SO PROVIDES.

EXCEPTION. BUT THE RULE HAS BEEN APPLIED IN SOME STATES THAT IF NO INJURY RESULTS TO THE INSURER BY REASON OF THE FALSE STATEMENTS, AND EVEN THOUGH THEY ARE KNOWINGLY AND WILFULLY FALSE, THE POLICY IS NOT AVOIDED.

OVERVALUATION. EXAGGERATED ESTIMATE OF THE INSURED AUTOMOBILE DOES NOT OPERATE TO AVOID INSURER'S LIABILITY, UNLESS SUCH ESTIMATE IS WILFULLY MADE, WITH INTENT TO CHEAT AND DEFRAUD THE INSURER IN OBTAINING PAYMENT OF LOSS UNDER POLICY.

§ 410. False statement—In general.

The right to examine the assured after proof of loss is a privilege reserved to the insurer, which it can exercise or

62. National Fire Ins. Co. v. Crabtree, 151 Ark. 561, 237 S. W. 97 (1922).

63. Sinincrope v. Hartford Fire Ins. Co. (theft), 201 N. Y. S. 615, 207 App. Div. 114.

64. Hessler v. North River Ins. Co., 211 App. Div. 595, 207 N. Y. S. 529.

not as it chooses. But it is not a duty imposed on the insurer in connection with the proof of loss, and forms no part of the proof of loss provided for in the policy. This provision, requiring assured to submit to examination after loss is a material condition of the policy, and if breached, the insurer is deprived of a valuable right for which it has contracted; but, generally speaking, it may be enforced by the insurer only by fixing a reasonable time and place for such examination.[65]

§ 411. False statement. (a) General rule.

False statements, in order to void the policy, must be made wilfully and knowingly, and with intent to cheat and defraud the insurer. Such statements must be material and be made with the intent to obtain more than the actual loss sustained.[66] Statements negligently made do not come within the rule. It is a question for the jury.[67]

§ 412. False statement. (b) Illustrations.

Fire insurance on an automobile is rendered void where the assured, after loss, falsely swore that no other insurance had been issued on the insured property.[68]

But the fact that assured had purchased the insured automobile under a conditional sale contract was not proof that his statement of ownership was false, for the seller had a right to treat the sale as absolute and give him legal title.[69]

Provision is not applicable to false statements by insured

65. Sunderlin on Fire Insurance (Lecture No. 26 on "Requirements in Case of Loss", p. 13).

66. Mosrie v. Automobile Ins. Co. of Hartford, Conn., —— W. Va. ——, 141 S. E. 871 (1928); Orient Ins. Co. v. Van Zandt-Bruce Drug Co., 50 Okla. 558, 151 Pac. 323 (1925).

67. Sunderlin on Fire Insurance (Lecture No. 26, on "Requirements in Case of loss," pages 9, 10).

68. Third National Bank v. Yorkshire Ins. Co., 218 Mo. App. 660, 267 S. W. 445 (1925).

69. National Mutual Ins. Co. of Celina, Ohio v. Bales, 81 Ind. App. 302, 141 N. E. 481 (1923).

in depositions made after refusal of the insurer to pay the insurance and filing of suit, for, in so far as it relates to matters subsequent to loss, it refers to statements made by the assured to induce payment of loss.[70]

It is not conclusive proof of false swearing because there exists a discrepancy in two proofs of losses to the amount of loss sustained.[71]

§ 413. False statement. (c) Exception.

But the rule in some states is that if no injury results to the insurer by reason of the false statements, and even though they are knowingly and wilfully false, the policy is not avoided.[72]

§ 414. False statement. (d) Overvaluation.

Mistatement of loss may be innocently made or by mistake. It may be based upon an erroneous estimate, which is but the expression of an opinion. To void the policy for overvaluation, it is not sufficient, then, for the insurer to prove mere overvaluation. The rule is that exaggerated estimate of the value of the loss does not operate to avoid insurer's liability, unless such an estimate is wilfully and fraudulently made. Unless the amount proven varies so greatly from the amount claimed as to clearly indicate fraud, the insurer will be liable. Thus it has been held in a Missouri case that fraud was not conclusively shown by the fact that insured's claim was for an amount in excess

70. Third National Bank v. Yorkshire Ins. Co., 218 Mo. App. 660, 267 S. W. 445 (1925).

71. National Mutual Ins. Co. of Celina, Ohio v. Bales, 81 Ind. App. 302, 141 N. E. 481 (1924).

72. Sunderlin on Fire Insurance (Lecture No. 26, on "Requirements in Case of Loss," p. 12). Citing fire insurance cases, other than automobile, as follows: Springfield F. &. M. Ins. Co. v. Winn, 27 Neb. 649, 5 L. R. A. 481, 43 N. W. 401; Sullivan v. Hartford F. Ins. Co., 89 Tex. 665, 36 S. W. 73; Cayon v. Dwelling House Ins. Co., 68 Wis. 510, 32 N. W. 540; Petty v. Mutual F. Ins. Co. 111 Iowa 358, 82 N. W. 767; F. Dohmen Co. v. Niagara F. Ins. Co., 96 Wis. 38, 71 N. W. 69; Knop v. National F. Ins. Co., 101 Mich. 359, 59 N. W. 653; Maher v. Hibernia Ins. Co., 67 N. Y. 283.

of the value of the car. Insured's claim was for $3,500. Conflicting evidence was introduced that a new car could be bought for $2,795, and that insured knew it. It was a question for the jury.[73]

§ 415. Massachusetts statute.

Massachusetts has a statute which provides that if insured shall furnish written statement of loss, the insurer cannot deny liability on the ground that the insured failed to furnish proof of loss, but it has been construed not to apply to policies covering theft as well as fire and not in the standard form.[74]

§ 416. Right of action. (a) Conduct.

Conduct of insurer's agents may be such as to constitute a waiver of the provision that no action could be brought until the expiration of sixty days after notice and proof of loss.[75] For example, where the insurer's agents waived formal proof of loss some six or seven months prior to time action was brought, insurer could not defend under the provision of the policy that action could not be brought until sixty days after filing proof of loss.[76]

§ 417. Right of action. (b) Waiver—Reservation of rights.

Where insurer assumed defense in action on automobile collision policy, but expressly reserved its rights in case it had been prejudiced by delayed notice, and thereafter withdrew from the case, waiver of condition requiring immediate notice of loss could not be inferred from such conduct.[77]

73. Campbell v. National Fire Ins. Co. (Mo. App.), 269 S. W. 645 (1925).

74. Paulauskas v. Firemen's Fund Ins. Co., 254 Mass. 1, 149 N. E. 668 (1925).

75. Callahan v. London & Lancashire Fire Ins. Co., Ltd., 98 Misc. 589, 163 N. Y. S. 322, aff'd 179 App. Div. 890, 165 N. Y. 1079.

76. Sawyer v. National Fire Ins. Co. (S. D.), 220 N. W. 503 (1929).

77. Weatherwax v. Royal Insurance Co., 250 N. Y. 281, 165 N. E. 293 (1929), rev. 228. N. Y. S. 919 (1928).

§ 418. Right of action. (c) Estoppel.

If the insurer has permitted filing of tardy proof of loss, it is estopped from defending on the ground that proof of loss was not filed in time provided by policy, even though information is thereafter acquired of an alleged conspiracy to defraud.[78]

But, even though the assured states in proof of loss that the automobile was subject to lease contract, he is not estopped from showing, in an action on the policy, the legal effect of the provision of the policy denying right of recovery in case of lien or mortgage on the car.[79]

Where the assured contends that the insurer is estopped from asserting the defense of forfeiture on account of the assured's failure to submit proof of loss, as provided for by the terms of the policy, it has been held that in order to constitute an estoppel, the conduct of the insurer must have misled the insured to his prejudice.[80]

§ 419. Right of action. (d) Repudiation of agreement.

Where the insured and the adjuster have reached an agreement by which the insurer is to pay the full insured value of the property destroyed, and the company then refuses to make the payment, the assured may bring action on the policy as soon as the agreement is repudiated by the company.[81]

§ 420. Pleading.

Complaint must allege that the plaintiff has complied with the provisions of the policy as to making proof of loss, otherwise it is subject to demurrer.[82]

78. Campbell v. National Fire Ins. Co. of Hartford, Conn. (Mo. App.), 269 S. W. 645 (1924).

79. Bennett v. Northwestern National Ins. Co., 53 Cal. App. 800, 257 Pac. 586 (1928).

80. Security Ins. Co. of New Haven v. McAlister, 90 Okla. 274, 217 Pac. 430.

81. Hill v. British & Foreign Marine Ins. Co., Ltd., 4 Pa. Dist. & Co. Rep. 9 (1923).

82. U. S. Lloyds, Inc. v. Savannah Marmon Agency, 29 Ga. A. 683, 116 S. E. 326 (1923).

In an action on a collision policy in the state of Illinois, the insurance company filed pleas to the merits, without referring to the proof of loss or raising any question concerning it, and also filed an affidavit of merits, in which no mention was made as to the failure of the plaintiff to comply with the provisions of the policy for filing proof of loss. The court held that the insurer had waived its right to defend on the ground of failure to submit proof of loss.[83]

§ 421. Evidence. (a) Notice lost in mails.

Proper foundation must be laid to introduce evidence of the contents of proof of loss on automobile fire insurance policy which was alleged to have been lost in the mails. Preliminary to introduction of such evidence, it must be shown that the insurer received the notice.[84]

§ 422. Evidence. (b) Previous losses.

It is proper to refuse an insurance company the right to offer in evidence, by way of impeachment, proof of the falsity of a statement by insured in his proof of loss that he had never had a previous theft, for insured's right to recover for theft of automobile is not affected by previous losses by theft.[85]

§ 423. Evidence. (c) Letters—Waiver.

Letters written after the expiration of the sixty day period provided for by the policy are admissible in evidence to show waiver of the provision.[86] Also, letter written by the insurance company to counsel for insurance and banking departments of state relating to appointment of adjuster and reciting its grounds for refusal to pay claim was

83. Garford Motor Truck Co. v. Miller's Nat. Ins. Co., 230 Ill. App. 622 (1923).

84. Glaser v. Williamsburg City Fire Ins. Co., 72 Ind. App. 319, 125 N. E. 787 (1920).

85. Thompson v. National Fire Ins. Co. of Hartford, Conn. (1925), 48 S. D. 224, 203 N. W. 464 (theft).

86. Continental Ins. Co. v. Burns, 144 Md. 429, 125 Atl. 232 (1924).

properly admissible in evidence to substantiate assured's contention that the insurer had waived proof of loss.[87]

§ 424. Evidence. (d) Agency.

Evidence was sufficient to show agency and sustain finding that he was in fact agent of the insurance company in receiving proofs of loss, where insured alleged that person stated that he represented insurance company, accepted proofs of loss, and was in fact an agent of the company, and evidence showed that the alleged agent had a "forthwith" notice in his possession which insured had previously mailed, and other papers bearing the insurance company's emblem.[88]

§ 425. Evidence. (e) Other insurance—Cars permitted to burn.

Where the insurer instituted an action against the insured to recover for false statement in the proof of loss that there was no other insurance on the automobiles, evidence was inadmissible that the insured automobiles were permitted to burn.[89]

§ 426. Evidence. (f) Erroneous answer in proof of loss.

Where the insurer's defense was based upon sworn proof of loss, which the assured signed without reading, to the effect that the car was rented contrary to the terms of the policy, but assured offered testimony that her answers to material questions in the proof were not properly recorded, the issue was one of fact for the jury to decide.[90]

§ 427. Burden of proof.

In an action where the assured alleges full compliance with the provisions of the policy, the burden is upon him

87. Shapiro v. Security Ins. Co., 256 Mass. 358, 152 N. E. 370 (1926).

88. Cupo v. Royal Ins. Co., 101 Conn. 586, 126 Atl. 844 (1925).

89. Pacific States Fire Ins. Co. v. C. Rowan Motor Co., 122 Ore. 665, 260 Pac. 441 (1927).

90. Collins v. Phoenix Assur. Co., Ltd. of London (theft), 215 Mo. App. 683, 258 S. W. 732, aff'd second appeal (Mo. App.), 285 S. W. 783 (1924).

to show that proofs of loss were furnished as provided for by the policy.[91] Thus, where the policy requires sworn statement of loss to be furnished the insurance company, the burden rests upon the assured to prove that proof of loss was provided. There is no presumption of the receipt of such proof where the insurance company fails to show that proof of loss was not received.[92]

§ 428. Jury. (a) Conflict in evidence.

Where a witness testified to delivering proof within the sixty day period, but the proof apparently bore a later date, is was a question for the jury to determine.[93]

§ 429. Jury. (b) Waiver.

Whether the evidence showed that the company's agent had been directed to adjust insured's claim and had denied liability in the presence of the company's secretary, so as to operate as a waiver of proof of loss and estop the insurer from relying upon the provision of the policy for making proof of loss, waiver was a question for the jury.[94]

§ 430. Non-suit.

Where the evidence tends to show that by refusing adjustment through its attorney, insurer waived requirement of written proof of loss, it is error for the court to enter non-suit against the assured.[95]

§ 431. Finding.

Finding by the court that the company's agent with authority from company, notified plaintiff that it was not

91. Ingersoll v. Union Automobile Ins. Co. (Ill. App.), 17 Ill. Law Rev. (App. Ct. Dig.), 203 (1922); Hessen v. Iowa Auto. Mut. Ins. Co., 195 Iowa 141, 190 N. W. 150 (1922).

92. Gallagher v. American Alliance Ins. Co. of New York (theft), 220 Ill. App. 476 (1921).

93. Wieson v. Auto. Ins. Co. (theft), 2 N. J. Misc. 1129, 126 Atl. 652 (1924).

94. Jones v. Automotive Ins. Co., 197 Iowa 513, 197 N. W. 448 (1924).

95. W. P. Hamblin Inc. v. Newark Fire Ins. Co., 48 R. I. 473, 139 Atl. 212.

necessary for him to make further proof of loss, is one of fact and not of law. Such a finding of fact warranted the conclusion of law that the company waived proof of loss.[96]

§ 432. Penalty and damages.

In action on automobile theft policy, where insurance adjuster induced the plaintiff to sign without reading the proofs of loss, which falsely stated that the car had been rented so as to defeat recovery, a penalty and attorney's fees were properly assessed as damages.[97]

§ 433. Appeal and error.

Upon appeal the insurer could not object to the trial court's remark to the jury that there was proof of waiver of the sixty day limit, where the insurer had not objected to the evidence as to such waiver, without its having been pleaded.[98]

96. National Fire Ins. Co. v. Gellman, 83 Ind. App. 219, 144 N. E. 154 (1924).

97. Collins v. Phoenix Assur. Co., Ltd. of London, 215 Mo. App. 683, 258 S. W. 732 (1926).

98. Wieson v. Auto. Ins. Co. (theft), 2 N. J. Misc. 1129, 126 Atl. 652 (1924).

CHAPTER XVI.

APPRAISAL, ARBITRATION AND AWARD.

SECTION.

434. In general.
435. Agreement to arbitrate—Definition.
436. Appraisal and arbitration distinguished.
437. Liability.
438. Same—Statute.
439. Stipulation reasonable and valid.
440. Condition precedent.
441. Disagreement necessary.
442. Fraud.
443. Revocable.
444. Waiver. (a) In general.
445. (b) Illustration.
446. (c) Refusal to arbitrate.
447. (d) Offer of settlement.
448. (e) Same—After suit.
449. (f) Subsequent agreement.
450. (g) Failure to accept insurer's estimate.
451. Notice.
452. Right to sue.
453. Technicalities.
454. Non-waiver agreement.
455. Oral agreement.
456. Award—Validity.
457. Same—Written submission.
458. Rate book.
459. Salvage.
460. Substitution of umpire.
461. Swearing.
462. Valued policy.
463. Total loss.
464. Law or equity.
465. Pleading and practice—Measure of liability.
466. Evidence—Impeachment.
467. Instruction—Taking oath.
468. Jury—Waiver.

REASONABLE AND VALID. APPRAISAL CLAUSE, WHICH LEAVES GENERAL QUESTION OF LIABILITY TO BE JUDICIALLY DETERMINED, IS REASONABLE AND VALID.

DISAGREEMENT NECESSARY. THE STIPULATION IS NOT EFFECTIVE UNLESS THERE IS A DISAGREEMENT AS TO THE AMOUNT OF THE LOSS.

CONDITION PRECEDENT. APPRAISAL, IT IS GENERALLY HELD, IS A CONDITION PRECEDENT TO ASSURED'S RIGHT TO INSTITUTE SUIT, WHERE THE POLICY CONTAINS APPRAISAL CLAUSE.

EXCEPTION. THE RULE DOES NOT APPLY IF INSURER FRAUDULENTLY BREACHES THE AGREEMENT TO APPRAISE.

DENIAL OF LIABILITY. INSURER'S DENIAL OF ALL LIABILITY UNDER THE POLICY WAIVES ITS RIGHTS TO DEMAND OR REQUIRE AN APPRAISAL.

REFUSAL TO APPOINT APPRAISER. FAILURE OR REFUSAL ON THE PART OF INSURER TO APPOINT APPRAISER, AFTER REQUEST TO DO SO BY ASSURED, WAIVES THE CONDITION.

SUBSEQUENT AGREEMENT. CONDITION OF THE POLICY FOR APPOINTING APPRAISERS MAY BE WAIVED BY SUBSEQUENT AGREEMENT TO OTHERWISE ADJUST THE AMOUNT OF THE LOSS.

JURY. WHETHER INSURER WAIVED PROVISION FOR APPOINTING APPRAISERS BY SUBSEQUENT ACTS OR CONDUCT MAY BE A QUESTION OF FACT FOR THE JURY.

§ 434. In general.

The appraisal clause of the automobile fire, theft and transportation policy approved by the national convention of insurance commissioners,[1] provides:

"In case the assured and this company shall fail to agree as to the amount of loss or damage, each shall, on the written demand of either, select a competent and distinguished appraiser. The appraisers shall first select a competent and disinterested umpire; and failing for fifteen (15) days to agree upon such umpire, then, on request of the assured or this company, such umpire shall be selected by a judge of a court of record in the county and state in which the property insured was located at time of loss. The appraisers shall then appraise the loss and damage, stating separately sound value and loss or damage to each item; and failing to agree, shall submit their differences only to the umpire. An award in writing, so itemized, of any two when filed with this company shall determine the amount of sound value and loss or damage. Each appraiser shall be paid by the party selecting him, and the expenses of appraisal and umpire shall be paid by the parties equally."[2]

1. Meeting in New York, December, 1919.
2. Meeting in New York, December, 1919.

§ 435. Agreement to arbitrate—Definition.

An agreement to arbitrate is really an agreement between parties who are in a controversy, or look forward to the possibility of being in one, to substitute a tribunal other than the court of the land to determine their rights.[3]

§ 436. Appraisal and arbitration distinguished.

Whether a proceeding following the loss of an insured automobile by theft was an arbitration or appraisal is not to be determined by the terminology alone which is used by the parties to the agreement, although it is of importance in construing the instrument, but the nature of the duties performed is of greater consequence.[4]

§ 437. Liability.

LIABILITY IS A QUESTION SEPARATE AND APART FROM APPRAISEMENT.

The question of liability for the loss is a question which is separate and distinct from that as to the amount of the loss. It is the duty of appraisers appointed in pursuance of the provision of the policy to ascertain the amount of the loss, and not the question as to who is liable for the loss. The question of liability is a judicial question. Thus it was held in a Georgia case that the appraisement was neither a statutory nor a common law award and could amount to nothing more than a contractual method of ascertaining the loss, settling no other fact, and could not alone be the basis of a judgment or cause of action.[5]

§ 438. Liability—Statute.

New York arbitration law does not change the rule that an agreement for the appointment of appraisers under the provision of an automobile insurance policy to determine

3. Sunderlin on Fire Insurance, Lecture No. 27, Appraisal, p. 4.

4. Searle v. Alliance Ins. Co. of Philadelphia (Manitoba), 4 D. L. R. 378 (1925).

5. United States Fidelity & Guaranty Co. v. Corbett, 35 Ga. A. 606, 134 S. E. 336 (1926).

the amount of damages to insured property does not constitute an "arbitration," as appraisers are not required to pass on the question of damages arising from the loss, and appraisal cannot be compelled under New York statute. The appraisal is not a submission of arbitration requiring the appraisers to be sworn.[6]

§ 439. Stipulation reasonable and valid.

Such a stipulation, not ousting the jurisdiction of the court, but leaving the general question of liability to be judicially determined, and simply providing a reasonable method of estimating and ascertaining the amount of the loss, is unquestionably valid.[7]

§ 440. Condition precedent.

Automobile insurance policy which provides for appraisal of loss by arbitration in event of disagreement, is a condition precedent to right of the insured to institute suit. The insured cannot recover on the policy until an appraisement has been made, unless the provision is waived or modified by the parties.[8]

§ 441. Disagreement necessary.

The stipulation is not effective unless there is a disagreement between the parties as to the amount of the loss; for, otherwise, there could be no occasion for an appraisal.[9]

6. Williams v. Hamilton Fire Ins. Co., 118 Misc. 799, 194 N. Y. S. 798 (1922).

7. Sunderlin on Fire Insurance, Lecture No. 27, Appraisal, pages 3, 4, citing cases.

8. Insurance Co. of North America v. Folds, 35 Ga. App. 720, 135 S. E. 107 (1926); Atlas Assurance Co. v. Williams, 158 Ga. 421, 123 S. E. 697, aff'g 31 Ga. App. 536, 121 S. E. 135 (1924); Rott v. Westchester Fire Ins. Co. (fire), 218 Mich. 576, 188 N. W. 334, (1922); Schwier v. Atlas Assurance Co. (theft), 227 Mich. 104, 198 N. W. 719 (1924); Offutt v. National Fire Ins. Co. of Hartford, Conn. (fire) (Mo. App.), 273 S. W. 161 (1925); See Lang v. Eagle Fire Co., 12 App. Div. 39, 42 N. Y. S. 539.

9. Baker v. Continental Auto. Ins. Ass'n, 111 Kan. 425, 207 Pac. 828 (1922); Cohen v. Ft. Dearborn Casualty Underwriters (Mo. App.), 285 S. W. 1024, (1926); Campbell v. National Fire Ins. Co. (Mo. App.), 269 S. W. 645 (1924); Searle v. Alliance Ins. of Philadelphia, 4 Dom. L. R. 378 (1925); Aubertin v.

§ 442. Fraud.

Where it is shown that insurer fraudulently breached agreement to appraise, the rule that legal appraisement is a condition precedent to suit by the insured does not apply.[10]

§ 443. Clause revocable.

But it has been held in a Pennsylvania case that the covenant in a policy of automobile insurance that any disagreement as to the amount of the loss shall be referred to appraisers to be selected by the parties is revocable and the insured may bring action at law on the policy without taking any steps to have a dispute between himself and the company as to the amount of the loss referred to the appraisers.[11]

§ 444. Waiver. (a) In general.

A denial by the insurer of all liability whatever under the policy waives such insurer's right to demand or require an appraisal of the loss, under the arbitration clause of the policy, for there is nothing to arbitrate where there is no liability.[12]

§ 445. Waiver. (b) Illustration.

Proof on the part of the insured that he went several times to the defendant's office in an effort to adjust the loss, and that he was told by defendant's authorized representative that they "would not do a damn thing" establishes a waiver of the appraisal clause of the policy.[13]

Northern Assurance Co., 37 Quebec K. B. 349 (1924); Goldberg v. Employers' Liability Assurance Co. (Can.), 1 West. Week Rep. 529, 66 D. L. R. 716 (1922).

10. Alliance Ins. Co. v. Williamson, 36 Ga. App. 497, 137 S. E. 277 (1927).

11. Gross v. Germania Fire Insurance Co., 29 Pa. Dist. Ct., 879 (1920).

12. Cohen v. Ft. Dearborn Casualty Underwriters (Mo. App.), 285 S. W. 1024 (1926); Callahan v. London & Lancashire Fire Ins. Co., 98 Misc. 589, 163 N. Y. S. 322, aff'd 179 App. Div. 890, 165 N. Y. 1079 (1917); Gross v. Germania Fire Insurance Co., 29 Pa. Dist. Ct. 879 (1920); Sunderlin on Fire Insurance, Lecture No. 27 "Appraisal", p. 9, citing cases.

13. Callahan v. London & Lancashire Fire Ins. Co., Ltd., 98 Misc. 589, 163 N. Y. S. 322, aff'd 179 App. Div. 890, 165 N. Y. 1079 (1917).

§ 446. Waiver. (c) Refusal to arbitrate.

A failure on the part of the insurer to appoint an appraiser to assist in adjusting a loss according to arbitration provision, after request to do so by insured, waives a condition of the policy requiring a determination by arbitration in case of disagreement as to the amount of the loss.[14]

§ 447. Waiver. (d) Offer of settlement.

WHERE ASSURED'S OFFER OF SETTLEMENT IS NEITHER ACCEPTED OR REFUSED.

Where insured made an offer of settlement, but the insurer never accepted or declined to agree to the amount stated, and never fixed any amount itself, insurer's defense that the insured had not complied with the provision of the policy for appointing appraisers was not sufficient to defeat recovery.[15]

§ 448. Waiver. (e) Offer of settlement—After suit.

APPRAISAL PROVISION IS NOT COMPLIED WITH BY OFFER TO NEGOTIATE AFTER SUIT.

Where the insurance company defends on the ground of insured's refusal to arbitrate, there is no waiver of the pleaded defense because negotiations were carried on between the parties after suit, looking to a settlement of the case, for the law commends efforts toward amicable settlements. Evidence that insured tendered arbitration after the commencement of the suit and that it was refused by the company, in such an action, is inadmissible.[16]

§ 449. Waiver. (f) Subsequent agreement.

In an action on a fire policy, where the insurer defended on the ground that the appraisal conditions of the policy had not been complied with, the evidence showed that, after the destruction of the car by fire, the insurance adjuster

14. Sunderlin on Fire Insurance, Lecture No. 27, "Appraisal", p. 8, citing cases.

15. Campbell v. National Fire Ins. Co. (Mo. App.), 269 S. W. 645 (1925).

16. Schwier v. Atlas Assurance Co., 227 Mich. 104, 198 N. W. 719.

and the insured agreed that the estimate of a garage man should constitute the appraisal. The court held that the insurer had waived the condition.[17]

§ 450. Waiver. (g) Failure to accept insurer's estimate.

Statement by the insurer's agent that the same make and model of automobile as the insured car could be purchased for a certain amount, and that this sum represented the value of the car was an admission of liability for the damage to the car under fire insurance policy; but where it appeared that the insured did not accept the estimate or amount in settlement, there was no waiver of the provision of the policy for right of appraisement in case of disagreement.[18]

§ 451. Notice.

AWARD OF APPRAISERS IS NOT INVALID BECAUSE OF FAILURE TO GIVE ASSURED NOTICE OF MEETING, WHERE THERE IS NO PROVISION FOR NOTICE.

An award of appraisers is not rendered invalid by failure to give the assured notice of their meeting, where there is no provision in the policy or the arbitration contract for such notice;[19] and especially is this true where the assured makes no request to come before the appraisers and make a statement or offer evidence. But it has been held that the parties are entitled to an opportunity to present evidence, and one made in violation of this right should be set aside,[20] except where it is shown that the appraisal was entirely upon their own knowledge and skill, or else that the party attacking the award waived a hearing.[21]

17. Offutt v. National Fire Ins. Co. of Hartford, Conn. (Mo. App.), 273 S. W. 161 (1925).

18. Hart v. Springfield F. & M. Ins. Co., 136 La. 112, 66 So. 558 (1914).

19. Eberhardt v. Federal Insurance Co., 14 Ga. App. 340, 80 S. E. 856 (1913); Home Insurance Co. v. Walter (Tex. Civ. App.), 230 S. W. 723 (1921).

20. Dufresne v. Marine Ins. Co., 157 Minn. 390, 196 N. W. 560 (1923); Fidelity Phoenix Fire Ins. Co. v. Mumaw (Tex. Civ. App.), 287 S. W. 120 (1926).

21. Dufresne v. Marine Ins. Co., 157 Minn. 390, 196 N. W. 560 (1924).

§ 452. Right to sue.

When the assured appoints an appraiser in good faith and the appraisal fails through a disagreement of the appraisers as to an umpire without fault of the assured, he has discharged his obligation and satisfied the requirements of the policy, and, generally speaking, he may then resort to the courts to have his loss determined.[22] But, if there is a mode of procedure under such circumstances provided for by statute, it will govern.

§ 453. Technicalities.

Where assured has sustained a loss, and an award has been made in accordance with the terms of the policy, the court will not weigh the technicalities of the method of arriving at the award and making the appraisal, when the appraisers and umpire were admittedly competent, and no injustice or fraud is committed.[23]

But the power of the arbitrators is limited to the terms of the agreement, and if they exercise authority in excess of that authorized, it will not be binding upon the parties, unless with full knowledge of the circumstances, such unauthorized acts are ratified.[24]

Arbitrators are not required to rely upon the statement of others alone as to the extent of the damage, but where they have expert knowledge may rely upon their own understanding as to values.[25]

§ 454. Non-waiver agreement.

NON-WAIVER AGREEMENT RESERVES QUESTION OF LIABILITY, BUT DOES NOT AFFECT CONCLUSION OF APPRAISERS AS TO AMOUNT OF LOSS.

It has been held in a New York case where an automobile

22. Globe & Rutgers Fire Ins. Co. v. Jewell-Loudermilk Co., 36 Ga. App. 538, 137 S. E. 286 (1927).

23. Sunderlin on Fire Insurance, Lecture No. 27, "Appraisal".

24. North River Ins. Co. v. Adams (Tex. Civ. App.), 300 S. W. 185.

25. Deckhart v. Globe & Rutgers Fire Ins. Co., 194 Wis. 579, 217 N. W. 322; Dechant v. Globe & Rutgers Fire Ins. Co., 194 Wis. 579, 217 N. W. 322.

collision policy stipulates that appraisers should determine the amount of the damage and non-waiver agreements provide that appraisal to determine the amount of the loss should not be considered as waiving any right, etc., or as admitting or denying liability, such non-waiver agreements reserve the question of liability, but do not affect the conclusions of the findings of appraisers as to the amount of the loss.[26]

§ 455. Oral agreement.

ORAL AGREEMENT NOT LEGAL WHERE ARBITRATION AGREEMENT PROVIDED IT SHOULD BE IN WRITING.

The provisions of the agreement for submission to arbitration must be complied with to arrive at a legal award. Thus, in an action by the owner of an automobile truck which had been damaged by fire, the agreement for submission provided that an award in writing by two arbitrators and an umpire should determine the amount of loss. An oral agreement as to the amount was made by the arbitrators, but was not reduced to writing. The court held that the evidence sustained the finding that the award was invalid.[27]

§ 456. Award—Validity.

The award of appraisers fixing the amount of damages to insured automobile is binding on the question of damages in the absence of fraud.[28]

The assured, then, has a right of action on the award,

26. Williams v. Hamilton Fire Insurance Co., 118 Misc. Rep. 799, 194 N. Y. S. 798.

27. Maryland Motor Car Ins. Co. v. Newell Contracting Co., 156 Ark. 424, 246 S. W. 468 (1925).

28. Williams v. Hamilton Fire Ins. Co., 118 Misc. 799, 194 N. Y. S. 798 (1922); United States Fidelity & Guarantly Co. v. Corbett, 35 Ga. App. 606, 134 S. E. 336 (1926); See Jones v. Orient Ins. Co., 184 Mo. App. 402, 171 S. W. 28.

only.[29] But a void award does not affect the rights of the parties, and the assured may then recover upon the policy.[30]

§ 457. Award—Written submission.

In the absence of provision in policy requiring written submission, it was not essential to the validity of the appraisement that the submission to the appraisers of a difference as to the amount of loss should have been in writing, and the appraisement was not vitiated because certain distinct parts thereof were not responsive to the submission, nor because it did not set out the fact upon which it was predicated.[31]

§ 458. Rate book.

APPRAISER'S AWARD WHICH IS BASED ON RATE BOOK AND FAILS TO TAKE INTO CONSIDERATION THE CONDITION OF THE CAR IS INVALID.

Appraiser's award must take into consideration value of insured automobile immediately before its destruction by fire, with proper consideration of its then condition and the number of miles traveled, the use which it had been subject to, its value in the vicinity where located, and as fixed by the fire policy. An appraiser's award which ignores these factors in determining value of an insured car, and fixes the amount of loss on the basis of price of second-hand cars as shown by book published in another city cannot be sustained.[32]

§ 459. Salvage.

ASSURED'S RIGHT OF ACTION NOT BARRED FOR NEGLECT TO TENDER SALVAGE.

29. Union Marine Insurance Co. v. Charlie's Transfer Co., 186 Ala. 443, 65 So. 78 (1914).

30. United States Fidelity & Guaranty Co. v. Corbett, 35 Ga. App. 606, 134 S. E. 336 (1926); Insurance Company of North America v. Folds, 35 Ga. App. 720, 135 S. E. 107 (1926).

31. United States Fidelity & Guaranty Co. v. Corbett, 35 Ga. App. 606, 134 S. E. 336 (1926).

32. Elliott v. Fidelity-Phoenix Fire Ins. Co. of New York (Mo. App.), 267 S. W. 441 (1925).

In a Maine case, appraisers appointed by the parties to determine the loss or damage were required by the policy to state "separately sound value and damage." In their report they fixed sound value at $2,325 and damage at $2,225. "Company to pay $2,225 and have salvage." However, the option of the insurer under the contract was to pay the damage and leave the salvage, or to pay the sound value and take the salvage. The insurance company rejected the award on the ground that it was invalid because it did not comply with the terms of the contract or the appraisal provision thereof, and failed to pay insured for the damage or to exercise its option to pay the sound value and take the salvage. The court held that the wording of the award did not deprive the insurer of any legal rights and that insured's right of action was not barred by her neglect to tender the salvage to the company.[33]

§ 460. Substitution of umpire.

APPRAISERS ARE WITHOUT AUTHORITY TO SUBSTITUTE AN UMPIRE FOR ONE WHO HAS BEEN REGULARLY SELECTED AND WHO HAS QUALIFIED, UNLESS UMPIRE SO SELECTED REFUSES TO ACT.

When the designated appraisers are authorized to select an umpire, and they exercise that authority, the umpire so selected upon taking the oath becomes a member of the appraisal body. The appraisers, thereafter, are without authority to substitute another person as umpire, unless the umpire so selected should refuse to proceed with the appraisal, or is unable to do so. Any award participated in and controlled by the vote of a substituted umpire, under such conditions, is necessarily void.[34]

§ 461. Swearing.

Common law appraisement of loss under automobile fire insurance policy does not require appraisers to be sworn.[35]

33. Hexter v. Equitable F. &. M. Ins. Co., 123 Me. 77, 121 Atl. 555 (1923).
34. Alliance Ins. Co. v. Williamson, 36 Ga. App. 497, 137 S. E. 280 (1927).
35. Alliance Ins. Co. v. Williamson, 36 Ga. App. 497, 137 S. E. 277 (1927).

§ 462. Valued policy.

Where the policy is valued and the loss is total, the policy itself fixes the amount of the loss.[36] An award cannot ignore the value as fixed in the policy.[37]

§ 463. Totol loss.

If the policy is not valued, it has been held that the appraisal clause is applicable, even though the loss is total.[38] But where the amount of the loss admittedly exceeds the face amount of the insurance policy, it would seem that there would be no reason for appraisal. It has been so held in fire insurance cases, other than automobile.[39]

§ 464. Law or equity.

In an action involving the legality of an award by appraisers, on an automobile fire insurance policy, the parties may obtain the same relief in court of law as in equity.[40]

§ 465. Pleading and practice—Measure of liability.

In a suit upon such a policy, to recover an amount appearing to have been determined by appraisers to be the amount of loss measured as above indicated, the petition was not subject to demurrer upon the ground that it showed that the appraisers had applied a measure of liability different from that contemplated by the policy, as it did not appear that the insurer had sought to have the appraisers estimate the loss in accordance with such special provision.[41]

36. United States Fidelity & Guaranty Co. v. Corbett, 35 Ga. App. 606, 134 S. E. 336 (1926).

37. Elliott v. Fidelity-Phoenix Fire Insurance Co. of New York (Mo. App.), 267 S. W. 441 (1924).

38. Hart v. Springfield Fire & Marine Insurance Co., 136 La. 114, 66 So. 558 (1914); Cohen v. Ft. Dearborn Casualty Underwriters (Mo. App.), 285 S. W. 1024 (1926).

39. Sunderlin on Fire Insurance, Lecture No. 27 on "Appraisal" p. 9, citing cases.

40. Alliance Ins. Co. v. Williamson, 36 Ga. App. 497, 137 S. E. 277 (1927).

41. United States Fidelity & Guaranty Co. v. Corbett, 35 Ga. App. 606, 134 S. E. 336 (1926).

§ 466. Evidence—Impeachment.

A statement by an appraiser under an automobile collision insurance policy that he signed the award because he believed it was not binding, did not avoid the award as such appraisers will not be heard to impeach their own decision.[42]

§ 467. Instruction—Taking oath.

In an action to recover on an award of appraisers under an automobile fire policy, there was no requirement that the appraisers in determining the loss should be sworn, either in the policy or in the agreement to appraise. The court instructed that if arbitration agreement required taking of oath and oath was not taken, the award was not binding. The appellate court held that the instruction was misleading in that there was no such requirement, but was rendered harmless, as the oath was shown to have been taken.[43]

§ 468. Jury—Waiver.

But where the insurance company denied liability on the ground that the amount of the loss was not ascertained by arbitration as required by the policy, the question whether the company waived the right to the appraisal of the loss by arbitrators by denying liability in excess of a specified amount is a question for the jury.[44]

42. Williams v. Hamilton Fire Ins. Co., 118 Misc. 799, 194 N. Y. S. 798 (1922).

43. Alliance Ins. Co. v. Williamson, 36 Ga. App. 497, 137 S. E. 277 (1927).

44. Rott v. Westchester Fire Ins. Co., 218 Mich. 576, 188 N. W. 334.

CHAPTER XVII.

SUBROGATION.

SECTION.
469. Right of subrogation.
470. Conventional subrogation.
471. Illustrations. (a) Partner.
472. (b) Garage keeper.
473. (c) Railroad.
474. Assignment.
475. Same—Statutes.
476. Negligence.
477. Settlement by and between assured and tort feasor. (a) Insurer's right of action against assured.
478. (a1) Laches.
479. (b) Insurer's right of action against third party.
480. (b1) Other injuries.
481. (b2) Proof of negligence and right of action.
482. (b3) Antecedent settlement.
483. Right of action—In general.
484. Illustrations.
485. Separate suits for injury to person and property.
486. Release of wrongdoer by assured.
487. Same—Pleading.
488. Joint action—Where damage to insured car exceeds amount of policy.
489. Insurer's right of action against assured for misstatement in proof of loss.
490. Conditional vendor negligent.
491. Liability of seller for conversion.
492. Insurer's right of action against bailee.
493. Proof; Conventional subrogation.
494. Stolen insured car.
495. Evidence—Stolen car.
496. Replevin to recover stolen car.
497. Right of action against subsequent purchaser.
498. Registration.
499. Waiver.
500. Measure of recovery.

LEGAL SUBROGATION. LEGAL SUBROGATION IS THE RIGHT BY OPERATION OF LAW WHICH THE INSURER THAT PAYS THE ASSURED FOR THE LOSS HAS TO BE SUBSTITUTED FOR THE ASSURED TO ANY RIGHT OF ACTION THAT THE ASSURED MAY HAVE AGAINST A THIRD PARTY TO RECOVER FOR THE DAMAGES.

CONVENTIONAL SUBROGATION. CONVENTIONAL SUBROGATION IS SAME RIGHT WHICH ARISES BY EXPRESS PROVISION OF INSURANCE CONTRACT.

ASSIGNMENT. INSURER'S RIGHT OF SUBROGATION AGAINST A THIRD PARTY DOES NOT DEPEND UPON OBTAINING ASSIGNMENT, AT LEAST IN THE ABSENCE OF STATUTORY ENACTMENT, BUT IS A LEGAL RIGHT WHICH ACCRUES TO THE INSURER BY NATURAL RIGHT BECAUSE IT HAS INDEMNIFIED ASSURED FOR THE LOSS.

NEGLIGENCE. RIGHT OF RECOVERY BY INSURER AS SUBROGEE, AGAINST A THIRD PERSON, IS FOUNDED UPON THE DOCTRINE OF NEGLIGENCE.

§ 469. Right of subrogation.

The right of subrogation is founded upon equitable principles. "Whenever a party discharges an obligation in performance of a legal duty—that is, an obligation for the performance of which he was legally bound, but for which his liability was subsequent to that of another party," says Pomeroy—"he is entitled to be subrogated to, and to have the benefit of, all rights of the creditor and all securities which may at any time have been put into the creditor's hands by a party whose liability is prior to his own, or which the creditor may have obtained from such party."[1]

Thus, on an automobile insurance contract, where the insurer pays the assured for the loss, it is immediately by operation of law and the equitable principles underlying the doctrine of subrogation substituted for the assured to any right of action that the assured may have against a third party to recover for the damages. This right is generally referred to as legal subrogation to differentiate it from conventional subrogation which arises in favor of the insurer by the express provision of the written contract.[2]

1. Pomeroy's Equitable Remedies, Vol. 5, sec. 2345, p. 5184.

2. Atlanta Cadillac Co. v. Manley, 29 Ga. App. 522, 116 S. E. 35 (1912); Smith v. United Warehouse Co., 123 Kan. 515, 255 Pac. 1115 (1927); John A. Boyd Motor Co. v. Claffey, —— Ind. App. ——, 165 N. E. 255 (1929); Byalos v. Matheson, 243 Ill. App. 60 (1926), aff'd 328 Ill. 269, 159 N. E. 242; Auto Owners' Protective Exchange of Kankakee, Ill. v. Edwards, 82 Ind. App. 558, 136 N. E. 577 (1922); Stevens v. Stewart-Warner Speedometer Corp., 223 Mass. 44, 111 N. E. 771 (1916); American Auto. Ins. Co. v. United Railways Co. 200 Mo. App. 317, 206 S. W. 257 (1918); Hamilton Fire Ins. Co. v. Greger, 246 N. Y. 162, 158 N. E. 60 (1927), rev'g 218 App. Div. 536; Allen

§ 470. Conventional subrogation.

Conventional subrogation rests upon contractual rights, rather than the automatic operation of a rule of law based upon equitable principles. It is provided for by the contract itself. The automobile insurance contract usually contains this provision: "The company may require from the assured an assignment of all right of recovery against any person for loss or damage to the extent that payment is made by the company."

§ 471. Illustrations. (a) Partner.

An insurance company paying a partner's share of automobile liability is subrogated to the partner's right to recover against the driver of the automobile.[3]

§ 472. Illustrations. (b) Garage keeper.

An insurer that paid assured for the loss of stolen automobile was subrogated to his rights and is entitled to maintain an action against the garage keeper in whose custody the automobile was left for repairs and through whose negligence the theft occurred.[4]

§ 473. Illustrations. (c) Railroad.

Automobile insurer paying loss caused by train became subrogated to any claim against railroad.[5]

Arnink Auto Renting Co. v. United Traction Co., 91 Misc. 531, 154 N. Y. S. 934 (1915); Steinfield v. Mass. Bonding & Ins. Co., 79 N. H. 422, 111 Atl. 303 (1920); American Central Ins. Co. v. Weller, 106 Or. 494, 212 Pac. 803 (1923); Manley v. Montgomery Bus Co., 82 Pa. Super. Ct. 530 (1924); Potomac Ins. Co. v. Nickson, 64 Utah. 395, 231 Pac. 445, 42 A. L. R. 128 (1924); Maxwell Gravel Co v. Fisher (Ind. App.), 151 N. E. 618 (1926); Buell v. United Firemen's Ins. Co., 167 Minn. 183, 208 N. W. 819; Platt v. Richmond R. Co., 108 N. Y. 358, 15 N. E. 393; Indemnity Co. of America v. Cox (Tex. Civ. App.), 298 S. W. 177 (1927); Sun Insurance Office v. Hohenstein, 128 Misc. Rep. 870, 220 N. Y. S. 386; Farmer v. Union Ins. Co. of Indiana, 146 Miss. 600, 111 So. 584.

3. Steinfield v. Massachusetts Bonding & Insurance Co., 79 N. H. 422, 111 Atl. 303 (1920).

4. Stevens v. Stewart Warner Speedometer Corp., 223 Mass. 44, 111 N. E. 771 (1916).

5. Hamilton Fire Ins. Co. v. Greger, 246 N. Y. 162, 158 N. E. 60 (1927), rev. 218 App. Div. 536.

§ 474. Assignment.

Insurer's right of subrogation against third person does not depend upon obtaining an assignment, even where the statute so provides, but it is a legal right which accrues to the insurer by natural right because it has indemnified the assured for the loss.[6]

§ 475. Assignment.—Statutes.

But there is a rule to the contrary, which is that the insurer must exercise the right of subrogation in the manner specified in the standard form policy.[7]

§ 476. Negligence.

Right of recovery by insurer which is subrogee of the owner of an insured car, against a third person, is founded upon the doctrine of negligence. Thus, in a Kansas case, the evidence disclosed that an automobile covered by a collision policy was taken out of a workshop where it had been left for repair, by garage keeper's employee, for the purpose of testing it. During the test, there was a collision between the insured car and another, but the accident was caused by the negligence of the garage keeper's employee. The court held that there was no right of action against the garage keeper either by the owner of the car or the insurer as subrogee.[8]

SETTLEMENT.

GENERAL RULE. IT IS GENERALLY HELD THAT WHEN AN ASSURED, UNDER AN AUTOMOBILE INSURANCE POLICY CONTAINING SUBROGATION CLAUSE, MAKES SETTLEMENT WITH WRONGDOER, THE INSURER IS ENTITLED TO RECOVER ANY SUM WHICH THE ASSURED RECEIVES IN EXCESS OF THE LOSS ACTUALLY SUSTAINED.

6. Sunderlin on Fire Insurance, Lecture No. 32, "Subrogation," p. 5; Continental Auto. Ins. Ass'n v. International Motor Co., 3 Pa. Dist. & Co., Ct. Rep. 504.

7. Sunderlin on Fire Insurance, Lecture No. 32, "Subrogation," p. 5; Continental Auto. Ins. Ass'n v. International Motor Co., 3 Pa. Dist. & Co. Ct., Rep. 504.

8. American Auto. Insurance Co. v. Clark, 122 Kan. 445, 252 Pac. 215 (1927).

EXCEPTION. BUT IT HAS BEEN HELD THAT A RELEASE OF THE WRONGDOER BY THE ASSURED UNDER SUCH CIRCUMSTANCES, RELEASES THE INSURER FROM LIABILITY ON THE POLICY.

LACHES. WHERE ASSURED RECOVERS FROM WRONGDOER IN A JUDICIAL ACTION, WITH KNOWLEDGE OF THE INSURER, AND DOES NOT RECOVER AN AMOUNT IN EXCESS OF THE LOSS, INSURER'S RIGHT OF ACTION AGAINST ASSURED MAY BE DEFEATED BY ITS OWN LACHES.

§ 477. Settlement by and between assured and tort feasor.

(a) Insurer's right of action against assured.

The general rule is that the insurer can recover from the assured, of the sum of money paid upon the policy, only the excess received from the wrongdoer after full compensation for his loss, including the costs and expenses. The insurer is entitled to recover any sum which the assured recovers in excess of the loss actually sustained.[9] However, it has been held that an automobile collision policy containing subrogation clause, where the assured made settlement with a municipality for an injury to the insured automobile resulting from collision with a fire engine and executed a complete release, there was no right of recovery against the insurer.[10]

An insured who, after recovery from the insurance company for damages to his truck in collision with a train, released the railroad company, was liable to the insurance company for the loss of its rights by subrogation, although the claim against the railroad included matters other than damage to the truck.[11] He was not entitled to deduct from the amount due the insurer attorney's fees and costs expended in prosecuting claim on the policy.[12] The amount so received will be applied in full or partial discharge of

9. Hamilton Fire Ins. Co. v. Greger, 246 N. Y. 162, 158 N. E. 60 (1927), rev. 218 App. Div. 536 (1926); Camden Fire Ins. Ass'n v. Prezioso, 93 N. J. Eq. 318, 116 Atl. 694 (1922).

10. Maryland Motor Car Ins. Co. v. Haggard (Tex. Civ. App.), 168 S. W. 1011 (1914).

11. Illinois Auto. Insurance Exch. v. Braun, 280 Pa. Rep. 550, 124 Atl. 691 (1924).

12. Illinois Auto. Insurance Exch. v. Braun, 280 Pa. Rep. 550, 124 Atl. 691 (1924).

the policy; but if insured executed a release to the wrongdoer, he will only be liable for the loss caused.[13]

§ 478. Settlement by and between assured and tort feasor. (a) Insurer's right of action against assured. (a1) Laches.

While it is true that the assured is not entitled to double compensation under any circumstances, from the assured and the wrongdoer, nevertheless the insurer's right of subrogation may be lost by its own laches. It has been held in a New York case that the insurer had no right of recovery from an assured with whom it had made settlement, where the assured, with the knowledge of the insurer, on his own responsibility and at his own expense pursued an action against a tort-feasor to a successful judicial determination; but there was no recovery in excess of the loss. The court said: "In the case at bar the insured did nothing to deprive the insurer of its right of subrogation. He did not execute a release in favor of the tort-feasor, but there was a judicial determination of his action against the tort-feasor. The insurer by its own laches deprived itself of this right of subrogation, and it cannot now be heard to complain. The insured was not twice paid for the injuries to the automobile by the tort-feasor, nor was there any recovery in excess of the actual loss proven, and there was no double recovery by the insured for the same loss." In this case the claim of insurer that it was entitled to recover from insured a part of the amount recovered by the latter against tort-feasor, in the same proportion that insurance money paid by it bore to total loss occasioned by tort-feasor, and for which suit was entered, was held untenable.[14]

13. Hamilton Fire Ins. Co. v. Greger, 246 N. Y. 162, 158 N. E. 60 (1927), rev. 218 N. Y. S. 536.

14. Sun Ins. Office v. Hohenstein, 128 Misc. 870, 220 N. Y. S. 386 (1927).

§ 479. Settlement by and between assured and tort feasor.

(b) Insurer's right of action against third party.

IN GENERAL. THE INSURER HAVING INDEMNIFIED THE ASSURED FOR THE LOSS, THE THIRD PARTY LIABLE FOR THE LOSS HAS NO LEGAL RIGHT TO THEREAFTER MAKE SETTLEMENT WITH THE ASSURED.

NOTICE. BUT IF THE THIRD PARTY DOES NOT HAVE NOTICE OF THE RIGHTS OF THE INSURER, SUCH A SETTLEMENT BINDS THE INSURER ALSO; AND THE INSURER SHOULD THEN LOOK TO THE ASSURED FOR REDRESS.

KNOWLEDGE. IF, UNDER SUCH CIRCUMSTANCES, THE THIRD PARTY SETTLES WITH THE ASSURED, WITH KNOWLEDGE THAT PAYMENT HAS BEEN MADE BY THE INSURER, HE IS STILL OBLIGATED TO PAY THE INSURER.

EXCEPTION. BUT WHERE JUDICIAL SETTLEMENT IS MADE WITH KNOWLEDGE OF INSURER'S RIGHTS, WHICH IS NOT BASED UPON THE FULL AMOUNT OF DAMAGES CAUSED BY THE THIRD PARTY'S NEGLIGENCE, BUT FOR PERSONAL OR OTHER DAMAGES ARISING OUT OF SAME CAUSE OF ACTION, THE INSURER'S RIGHT OF ACTION ACQUIRED BY SUBROGATION IS NOT DEFEATED.

PROOF. INSURER CAN RECOVER FOR ASSURED'S RELEASE OF ITS CLAIM AGAINST THIRD PARTY ONLY IF IT PROVES THAT ASSURED COMMITTED WRONG AND THAT IT COULD HAVE RECOVERED ON THE CLAIM.

The insurer having indemnified the insured for the loss, the third person liable for the loss has no legal right to thereafter make settlement with the insured, and if he does so with knowledge that payment has been made by the insurer, he is still obligated to pay the insurer.[15] For example, it was held in a New Jersey case that insurance company's right against a tort-feasor through whose negligence loss occurred to recover the amount paid on the policy covering such loss is not barred by a settlement between the latter and the insured for a sum less than such tort-feasor's liability, though insured gave full release, where such release was a fraud on the insurer.[16]

But insurer who it subrogated to owner's rights cannot recover from wrongdoer who without notice of company's rights settled with owner of wrecked car. The insurer,

15. Camden Fire Ins. Ass'n v. Prezioso, 93 N. J. Eq. 318, 116 Atl. 694 (1922).
16. Camden Fire Ins. Ass'n v. Prezioso, 93 N. J. Eq. 318, 116 Atl. 694 (1922).

under such circumstances, should look to the assured for redress.[17] Said the court in a leading New York case: "The release has certainly not destroyed the right to recover against the railroad company which the insurance company obtained by subrogation when it paid Greger for the loss sustained by the destruction of the automobile, if the railroad company paid less than full damages caused by its negligence and obtained the release with knowledge that the insurance company had paid to Greger part of these damages under the insurance policy. * * * There is evidence in this case from which it might be inferred that the railroad company did acquire such knowledge from an examination of Greger held at its instance. There is, indeed, a question of fact whether in view of all the circumstances, including the form of the complaint and of the release, the parties to the release ever contemplated that the railroad company should be released from any claim already transferred to the insurance company for damages to the automobile."[18]

§ 480. Settlement by and between assured and tort feasor. (b) Insurer's right of action against third party. (b1) Other injuries.

If the settlement which the assured makes with a wrongdoer does not cover the damages to the insured car for which he has been compensated by the insurer, but personal or other damages arising out of the same cause of action, he will not be liable to account to the insurer for the moneys so received, or any part thereof. Said the court in the New York case (supra): "The affidavits in this case do not, however, show that the railroad company has paid to the insured the damages for which he has already re-

17. Hamilton Fire Ins. Co. v. Greger, 246 N. Y. 162, 158 N. E. 60 (1927), rev. 218 App. Div. 536, 218 N. Y. S. 534 (1926); See American Automobile Insurance Co. v. Clark (collision), 122 Kan. 445, 252 Pac. 215 (1927).

18. Hamilton Fire Ins. Co. v. Greger, 246 N. Y. 162, 158 N. E. 60 (1927), rev. 218 App. Div. 536, 218 N. Y. S. 534 (1926).

ceived indemnity from the insurance company. Even after the insurance company was subrogated to the claim of Greger, the insured, against the railroad company for the destruction of the automobile, Greger still had the right to proceed against the railroad company to recover for his own benefit any damages for personal injuries or to other property which were caused by the same accident. The complaint in the action brought by Greger against the railroad company included a claim for personal injuries and for injury to property other than the automobile. Indeed the complaint is so phrased that it is not entirely clear that it was intended to include any claim for the loss of the automobile. Even a judgment entered upon a general verdict in an action which was brought to recover every loss suffered by negligence of the railroad company might not allow the inference that the judgment included the full sum paid to the insured for the loss of the automobile. * * * Here no verdict was rendered, and it is not claimed that the amount paid by the railroad company to Greger represented more than a compromise of a disputed liability, and no inference can be drawn that it constituted a full payment in the present action in favor of the insurance company against Greger. Therefore, the contention can not be sustained upon the theory that Greger has received from the railroad company moneys which equitably belonged to the insurance company." [19]

§ 481. Settlement by and between assured and tort feasor.
(b) Insurer's right of action against third party.
(b2) Proof of negligence and right of action.

Insurer can recover for insured's release of its claim against wrongdoer only if it shows insured committed wrong and that it could have recovered on claim.[20] On this point,

19. Hamilton Fire Ins. Co. v. Greger, 246 N. Y. 162, 158 N. E. 60 (1927), rev. 218 App. Div. 536, 218 N. Y. S. 534 (1926).

20. Hamilton Fire Ins. Co. v. Greger, 246 N. Y. 162, 158 N. E. 60 (1927), rev. 218 App. Div. 536, 218 N. Y. S. 534 (1926).

the New York court has said: "Even if it should appear that in fact the release was taken by the railroad company without knowledge that the insurance company was subrogated to part of Greger's claim against the railroad company and was intended to cover all the damages suffered by Greger, it would still appear that the insurance company should recover only for the loss it has sustained by that release. If Greger has acted wrongfully and in derogation of the rights of the insurance company, he should pay the damages which he has caused. After payment of the insurance money, the insurer became the equitable owner of any right of action of the assured to recover the same damages against the person primarily liable. The courts of some other jurisdictions have held that a release given by the assured to an alleged wrongdoer before payment by an insurance company of the damages caused by the alleged wrongdoer constitutes a defense to an action upon the policy, regardless of whether or not recovery might have been had against the wrongdoer if no release had been given. * * * We are not called upon to decide whether in the same circumstances we would reach a like conclusion. Here the insurance company asserts a claim against the assured for wrong and damages alleged to have been caused to it by the assured. * * * It must in such case show that in fact the wrong has been committed and also the damages caused thereby." [21]

§ 482. Settlement by and between assured and tort feasor. (b) Insurer's right of action against third party. (b3) Antecedent settlement.

Under the authorities and in the light of reason, an insurer who undertakes to indemnify the assured, with full knowledge of an antecedent settlement between him and the party causing the injury, does so at its peril, is a mere volunteer, and cannot recover of the assured under the sub-

21. Hamilton Fire Ins. Co. v. Greger, 246 N. Y. 162, 158 N. E. 60 (1927), rev. 218 App. Div. 536, 218 N. Y. S. 534 (1926).

rogation clause of the contract, because the right of subrogation, under such circumstances, had been destroyed.[22]

RIGHT OF ACTION.

IN GENERAL. THE INSURER HAS NO RIGHT OF ACTION EXCEPT SUCH AS MAY HAVE EXISTED IN FAVOR OF THE ASSURED.

PARTIES. THE ASSURED HAS RIGHT OF ACTION IN HIS OWN NAME, AND THE INSURER IS NOT A NECESSARY PARTY.

EXCEPTION. BUT THERE IS A RULE TO THE CONTRARY WHICH RECOGNIZES THAT AFTER SETTLEMENT HAS BEEN MADE BY THE INSURER, THE ASSURED HAS NO BENEFICIAL INTEREST IN THE ACTION, AND HE MAY MAINTAIN THE ACTION ONLY WHERE IT IS BROUGHT IN HIS NAME FOR THE USE AND BENEFIT OF THE INSURER.

SEPARATE SUITS. IT HAS BEEN HELD THAT SEPARATE SUITS MAY BE MAINTAINED FOR INJURY TO PERSON OR PROPERTY WHERE THERE EXIST SEPARATE AND DISTINCT RIGHTS IN THE ASSURED AND INSURER TO RECOVER.

BUT IT HAS ALSO BEEN HELD THAT UNDER SUCH CIRCUMSTANCES THE ASSURED AND INSURER MAY JOINTLY SUE.

PLEADING. AN ANSWER IS SUFFICIENT WHICH ALLEGES THAT THE DAMAGE TO THE INSURED'S CAR WAS DUE TO THE WRONGFUL ACT OF A THIRD PARTY, AND THAT THE THIRD PARTY PAID TO THE ASSURED AN AMOUNT IN EXCESS OF THAT FOR WHICH A RECOVERY IS SOUGHT UNDER THE POLICY, AND THAT THE ASSURED RELEASED THE WRONGDOER FROM ANY RIGHT OF ACTION ARISING AGAINST HIM BY REASON OF HIS NEGLIGENCE.

§ 483. Right of action.—In general.

The insurer has no right of action except such as may have existed in favor of the assured.

It has been held that notwithstanding that the insurer has paid the assured the loss occasioned to the insured car, the assured has a right of action in his own name against the wrongdoer, and the insurance company is not a necessary party to the action.[23] The theory supported by these decisions is that the wrongdoer is not concerned with the

22. Sunderlin on Fire Insurance, Lecture No. 32, "Subrogation," p. 9.

23. Henican v. Woodman, 1 La. App. 281 (1924); Henderen v. Crescent City Seltzer & M. Water Co., 1 La. App. 625 (1925); Brown v. British Columbia Electric R. Co. (B. C.). D. L. R. 734 (1925); Gough v. Toronto & Y. Radial R. Co. 42 Ont. L. Rep. 415 (1918).

insurance contract existing by and between the insurer and the assured, and is not affected by any settlement thereunder. Said the court in a Canadian case: "When an action is being brought or defended in the name of an insurance company, it is thought that in the eyes of the jury this prejudices the case, and so it has been held to be most improper to refer to that fact in evidence or argument, for this has nothing to do with the issues presented for trial. What is desired is to compel the insurance company to disclose on the face of the record the fact that it is suing. Apart from the fact that the right to sue in the name of the assured is clear when there is subrogation, and from the fact that in cases of tort this is the only way in which an action can be brought, this is an attempt to accomplish an undesirable object in an indirect way. It may be that the defendants are themselves insured; and it would be just as fair to compel them to disclose this fact."[24]

But a rule to the contrary is recognized, which is based on the theory that the assured, after settlement has been made by the insurer, has no beneficial interest in the action against the wrongdoer, and he may maintain the action only where it is brought in his name for the use and benefit of the insurer.[25] This rule is followed in jurisdictions requiring suits to be brought in the name of the real party in interest.

§ 484. Illustrations.

(a) Money recovered from garage owner for damage to stolen automobile belongs to insurer which paid owner insurance, and action for damage to stolen automobile can be brought by insurer of car after paying insurance.[26] (b) If

24. Gough v. Toronto & Y. Radial R. Co. 42 Ont. L. Rep. 415 (1918).

25. Joy Floral Co. v. Norris, 34 Ga. App. 796, 131 S. E. 920 (1926); Heck v. Henne, 238 Mich. 198, 213 N. W. 112 (1927); Waters v. Schultz, 233 Mich. 143, 206 N. W. 548 (1925); John A. Boyd Motor Co. v. Claffey, —— Ind. App. ——, 165 N. E. 255 (1929).

26. Byalos v. Matheson, 243 Ill. App. 60 (1926), aff'd 328 Ill. 269, 159 N. E. 242 (1927).

the insurer has paid the claim of the assured under the policy and seeks to recover from a third party who was responsible for the accident, the action, if based upon the equity of subrogation, should be in the name of the insured to the use of the company, or if by assignment, in the name of the assignor to the use of the assignee.[27]

§ 485. Separate suits for injury to person and property.

An insurer of an automobile who has, in accordance with a provision of the policy, become subrogated to the claim of the owner for damages thereto against a street railway company before the institution by such owner of a suit for personal injuries growing out of the same accident, in which a judgment has been recovered, is not precluded thereby from maintaining an action.[28] Said the supreme court of the state of Mississippi in such a case: "Appellant had an equitable interest in the automobile at the time of the collision by reason of having written the policy of insurance. When it was damaged, then, by virtue of the contract of insurance and the article of subrogation, appellant had such an interest in the claim for damages. This interest became a right to sue at law when appellant paid * * * the amount owing him (assured) for loss under the policy and received from him (assured) assignment of his claim and was subrogated to his right so received for damages. * * * There were then two distinct causes of action, two separate rights to recover, in two different persons."[29]

§ 486. Release of wrongdoer by assured.

When an assured releases a wrongdoer from liability for injury to an automobile and thereby extinguishes the insurer's right of subrogation, the insurer is released from

27. Continental Auto. Insurance Ass'n v. International Motor Co., 3 Pa. Dist. & Co. Ct. 504 (1923).

28. Underwriters at Lloyds Ins. Co. v. Vicksburg Traction Co., 106 Miss. 244, 63 So. 425 (1913).

29. Underwriters at Lloyds Ins. Co. v. Vicksburg Traction Co., 106 Miss. 244, 63 So. 425 (1913).

liability on the policy.[30] Thus, in a Mississippi case, the assured had brought an action against a railroad company for damages not only to the insured automobile, but for personal damages as well. Judgment was rendered against the railroad company by agreement of the parties. It was the contention of assured that the insurer had agreed to the procedure in the case to enter judgment against the railroad company, on condition that the declaration was amended so as to eliminate from the action the right of recovery for damage to the insured car. But the judgment contained no recital that the assured was reserving a right of action to recover for damages to the car, and it was held that the effect of the judgment was to release the railroad company for both personal and property damages. The court held that the assured's right of action on the insurance policy was also extinguished.[31]

§ 487. Release of wrongdoer by assured.—Pleading.

In an action on a liability policy containing the subrogation clause, an answer is sufficient which alleges that the damage to the insured's car was due to the wrongful act of a third party, and that the third party had paid an amount in excess of that for which a recovery was sought under the policy to the assured for full settlement of the damages, and that the assured had released the wrongdoer from any right of action arising against him by reason of his negligence.[32]

In an Indiana case, discussing this point, the court said: "The general rule is that where the tortious conduct of a third party is the cause of a loss, the insurer becomes subrogated by operation of law to whatever right the insured may have against the wrongdoer.

"The wisdom of that rule is apparent. To permit the

30. Auto. Owners' Protective Exchange v. Edwards, 82 Ind. App. 588, 136 N. E. 577 (1922).

31. Farmer v. Union Ins. Co. of Indiana, 146 Miss. 600, 111 So. 584 (1927).

32. Auto. Owners' Protective Exch. v. Edwards, 82 Ind. App. 588, 136 N. E. 577 (1922).

insured to receive payment from both the wrongdoer and the insurer would be to give him double compensation for his loss. The wrongdoer cannot be permitted to shield himself on the theory that the loss is covered by insurance, for the contract of insurance was not made for his benefit. Manifestly it would be unjust to compel the insurer to suffer the consequences of the wrongful act of another. The provisions of the policy, requiring the insured to assign in writing his claim or cause of action against the wrongdoer, gives the insured no greater right with respect to subrogation than the law would confer if the contract were silent on that subject. By the terms of the contract the insured is under no obligation to make the assignment until the insurer has paid the indemnity. The utmost that the insurer can demand under the terms of the contract is that the assignment shall be made simultaneously with the payment of the indemnity. Since there is no averment in the fifth paragraph of the answer that the insurer has paid the indemity, it follows in strict logic that it has acquired no right of subrogation. Nevertheless there must be a way to enforce the rights and liabilities of the parties as they existed at the time of the loss; for it would be folly to permit the beneficial purpose of the rule to be defeated merely because, in the matter of paying the loss, the wrongdoer went ahead of the insurer. There is, therefore, an additional and supplementary rule applicable to such cases. That rule is that any payment as damages received by the insured from the wrongdoer, before settlement with the insurer, reduces, by operation of law, the liability of the insurer to the extent of the payment; and, where the insured releases his right of action against the wrongdoer before settlement with the insurer, that release destroys, by operation of law, his right of action on the policy." [33]

33. Auto. Owners' Protective Exch. v. Edwards, 82 Ind. App. 588, 136 N. E. 577 (1922).

§ 488. Joint action.—Where damage to insured car exceeds amount of policy.

Where the damage to the insured car amounts to more than the policy, in an action on a collision policy it has been held that the insurer and assured may jointly sue to recover for the total amount of the damages, the insurer recovering the amount it was compelled to pay the assured for the loss under the policy, and the assured for the damages in excess of the amount recoverable by the insurance company.[34] But it has been held that the right of action remains in the insured against the wrongdoer, where the insurer had made only partial settlement of the loss.[34a]

§ 489. Insurer's right of action against assured for misstatement in proof of loss.

On an automobile collision policy containing subrogation clause, the assured stated in his proof of loss that he had done nothing to violate any of the conditions of the policy. The insurer, relying upon the truth of the statement and the good faith of the assured, paid the loss. However, in fact, the assured had previously made settlement with the wrongdoer, a taxicab company, and had released it in full from all claims that could arise by reason of its negligence. The court held that the insurer had a right of action to recover the amount it had paid the assured without regard to the assured's good intentions.[35]

§ 490. Conditional vendor negligent.

CONDITIONAL VENDOR WHOSE NEGLIGENCE CAUSED THE LOSS CANNOT RECOVER.

An automobile theft policy insured the interests of both the conditional vendor and conditional vendee, as their in-

34. Maxwell Gravel Co. v. Fisher (Ind. App.), 151 N. E. 618 (1926); See Smith v. United Warehouse Co., 123 Kan. 515, 255 Pac. 1115.

34a. Wyker v. Texas Co., 201 Ala. 585, 79 So. 7, L. R. A. 1918F, 142.

35. Tokio Marine & Fire Ins. Co., Ltd. v. Parnes, 127 Misc. 602, 216 N. Y. S. 783 (1926).

terests might appear, and the insured car was stolen because of negligent conduct of the conditional vendor. The conditional vendee then made an assignment of his interest in the money payable on the policy to the conditional vendor. It was held that the conditional vendor had no right of recovery against the insurer, for, under the subrogation clause of the policy, the insurer had a right to recover from the conditional vendor for negligence.[36]

§ 491. Liability of seller for conversion.

An automobile was sold upon conditional sale contract. The seller assigned the contract to a bank and guaranteed payment, and procured insurance on the car, and also against conversion. The buyer was named as the assured. Loss was made payable to the bank or the buyer, as their interests might appear. The buyer thereafter converted the insured automobile, and the insurance company paid the loss to the bank. The court held that the insurance company was not subrogated to the rights of the bank against the seller on the guaranty, as it insured the automobile and not the debt. It would be inequitable and unconscionable, suggested the court, to hold the seller responsible for the conversion.[37] Payment of the amount due on the policy to the bank satisfied the debt to that amount as against the guarantor, and it could not be assigned to the insurance company.

§ 492. Insurer's right of action against bailee.

An insurer which had paid a loss under an automobile theft insurance policy to the assured has right of action against a bailee who misdelivered the car, and the bailee cannot defend on the theory that the policy was against theft and not against misdelivery.[38]

36. Buell v. United Firemen's Ins. Co., 167 Minn. 183, 208 N. W. 819 (1926).
37. American Central Ins. Co. v. Weller, 106 Or. 494, 212 Pac. 803 (1923).
38. Potomac Ins. Co. v. Nickson, 64 Utah 395, 231 Pac. 445, 42 A. L. R. 128 (1924).

§ 493. Proof; conventional subrogation.

INSURER IS NOT REQUIRED TO SHOW THAT LOSS WAS COVERED BY POLICY.

A surety company which pays the assured the loss under its policy and obtains a conventional subrogation of the claim against a street railway company is not required to prove, in an action against the street railway company, that it was legally liable to the assured. The court in a Louisiana case in point said: "Whatever effect such defense may be entitled to if addressed to a legal subrogation, it is without merit where the subrogation is conventional." [39]

So it was held in an Indiana case that an insurer, suing under assignment of owner for garage's employee's negligence in wrecking car, was not required to show that loss was covered by insurance policy.[40]

§ 494. Stolen insured car.

Where the insurer defended on the ground that the insured car was not the property of the assured, but was a stolen car, but the court held that as the assured had purchased the car in good faith he was the rightful owner for the purpose of maintaining the action, the insurer's right of subrogation was not impaired; and this rule was held to apply even though the insurer could not recover another car found in another state in the hands of its rightful owner, and bearing the same number as the stolen car.[41]

§ 495. Evidence.—Stolen car.

Where the insurer as subrogee seeks to recover a stolen automobile from a person in possession by purchase from a third party, it must prove a better title than the *prima facie* title of the one in possession.[42]

39. United States Fidelity & Guarantly Co. v. O'Keefe, 1 La. App. 24 (1924).
40. Empoyers' Fire Ins. Co. v. Consolidated Garage & Sales Co., 85 Ind. App. 674, 155 N. E. 533.
41. Barnett v. London Assurance Corp., 138 Wash. 673, 245 Pac. 3 (1926).
42. Federal Ins. Co. v. Munden (Tex. Civ. App.), 203 S. W. 917 (1918).

§ 496. Replevin to recover stolen car.

Where an automobile theft insurance policy provided that on payment of loss the company could be subrogated to the rights of insured, by settling with the insured for a theft of a motor truck, and the stolen car was discovered 75 days after proofs of loss, the company could bring replevin to recover the stolen truck and thus minimize its loss.[43]

§ 497. Right of action against subsequent purchaser.

An insurance company having taken an assignment and bill of sale of a stolen automobile, upon payment of the loss by it, had a right to maintain a writ of sequestration to determine the ownership, as against one whose title and right of possession came into existence subsequent to the execution of such assignment and bill of sale.[44]

§ 498. Registration.

Under a Kansas statute providing that a sale of a car shall be void unless the registration certificate is indorsed by the seller and purchaser, and notice of sale given to the secretary of state, where a third party, without complying with the statute, had obtained bill of sale from assured to insured car before it was stolen, and the insurer thereafter had settled with the assured, and obtained assignment, it was held that the insurer was entitled to the car.[45]

§ 499. Waiver.

Where insured offered to assign his claim against the person responsible for the loss to the company's attorney, who refused to accept such assignment for want of authority and because reasonable time had not elapsed for making an investigation, and insured immediately afterwards settled

43. Cancilla v. Fireman's Fund Ins. Co. of San Francisco, 277 Pa. 223, 120 Atl. 824 (1923).

44. Dawedoff v. Hooper (Tex. Civ. App.), 190 S. W. 522 (1917).

45. Miller v. Colonial Underwriters Ins. Co. of Hartford, 117 Kan. 240, 230 Pac. 1030 (1924).

with the wrongdoer, the insurer had not waived its right of subrogation as given in the policy.[46]

§ 500. Measure of recovery.

The insurer's right of subrogation must be measured by the terms of the clause providing for it. It is limited to the amount of loss actually paid, except where the insurance does not cover the entire loss, and there is an assignment of the entire third party claim to the insurer.[47]

46. Maryland Motor Car Ins. Co. v. Haggard (Tex. Civ. App.), 168 S. W. 1011 (1914).

47. Sunderlin on Fire Insurance, Lecture No. 32, "Subrogation," p. 6.

CHAPTER XVIII.

PROCEDURE.*

PLEADING AND PRACTICE—EVIDENCE—INSTRUCTIONS, ETC.

SECTION.

501. Insurer's liability.
502. Limitation of action.
503. Attorney and client. (a) Fees.
504. (b) Privileged communication.
505. (c) Right of insured's attorney to represent injured claimant.
506. Agent—Dual capacity—Void contract.
507. Assignment.
508. Same—Oral contract.
509. Parties. (a) Who sustains loss.
510. (b) Conditional sales contract.
511. (c) Assignment.
512. (d) Separate interests.
513. (e) Joint payees.
514. Complaint. (a) Ownership.
515. (b) Waiver and estoppel—Sufficiency.
516. Amendment—Limitation of action.
517. Answer. (a) Former action.
518. (b) Limited liability.
519. (c) Defense not pleaded.
520. (d) When special plea of waiver not necessary.
521. Evidence. (a) Parol.
522. (b) Incendiarism.
523. (c) Admission.
524. (d) Opinion of adjuster.
525. (e) Identity.
526. (f) Conflicting—Fraud.
527. (g) Expert.
528. (h) Same—Cause of fire.
529. (i) Value.
530. (j) Same—Fraud.
531. (k) Undelivered bill of sale.
532. (l) Additional insurance.
533. (m) Sufficiency.
534. (n) Policy issued subject to another.

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*Questions concerning procedure, pleading and practice, evidence, instructions, jury, judgment, appeal and error, etc., have been specially presented in the different chapters of this book in connection with the subjects to which they more particularly apply. This chapter, then, covers such subjects only in a general way.

SECTION.
535. (o) Process of elimination.
536. (p) Cancellation.
537. (q) Directed verdict.
538. Burden of proof.
539. Instructions. (a) Duress.
540. (b) Deliberate act.
541. (c) Measure of recovery.
542. (d) What constitutues new car.
543. (e) Waiver of defenses.
544. Jury. (a) Prejudice.
545. (b) Modification of policy.
546. (c) Vexatious refusal to pay loss.
547. (d) Conflict in findings.
548. Appeal and error. (a) Verdict of jury.
549. (b) Hearsay evidence.
550. Judgment. (a) Time of payment.
551. (b) Right of action—When accures.

§ 501. Insurer's liability.

A suit brought upon a policy of automobile insurance is not an ordinary suit for damages and the tort rule for damages does not apply.[1] The damages payable must be ascertained from the terms of the policy.[2]

§ 502. Limitation of action.

If the policy provides that an action to recover for a loss must be brought within 12 months after the loss occurs, there can be no recovery unless the suit is brought within the time specified.

Thus, in such a case, when the insured did not bring an action to recover on a theft insurance policy until sixteen months after the loss, there being no proof of waiver, the company was not liable.[3]

So it has been held that where provision in automobile theft insurance requires any suit or action upon the policy to be commenced within twelve months next after happening of loss, a delay of sixteen months after theft of car be-

1. Haussler v. Indemnity Company of America, 227 Ill. App. 504 (1923).
2. Brown v. International Indemnity Co., 121 Kan. 406, 247 Pac. 432 (1926).
3. Petrullo v. Mechanics' Ins. Co. of Philadelphia, 4 N. J. Misc. 586, 133 Atl. 766 (1926).

fore commencing action, in the absence of waiver, was fatal to recovery.[4]

§ 503. Attorney and client. (a) Fees.

An attorney who is employed by the insurer to prosecute a claim for damages arising against a wrongdoer in behalf of and in the name of the assured, under an agreement whereby the insurer is responsible for all costs, attorney fees and expenses, has no right, as against the assured, to retain his fees from the amount collected. The assured has a right, in an action for money had and received, to recover the money.[5]

§ 504. Attorney and client. (b) Privileged communication.

Good faith communications between attorney and client, relating to the best method of protecting client's interest, are privileged; and the rule that privilege may not be urged respecting communications relating to perpetration of fraud is limited, ordinarily, to cases of actual fraud involving moral turpitude.[6]

§ 505. Attorney and client. (c) Right of insured's attorney to represent injured claimant.

The insurer having unsuccessfully defended the assured in an action brought against him by the injured claimant, it refused to pay the judgment. The assured brought an action on the policy against the insurer, and was represented by the same attorney. Suit was then brought to restrain prosecution of the action on the ground that assured had conspired with the injured claimant to collect on the judgment. The attorney who had represented the injured claimant also represented the assured in this action, and was at the time representing the assured in four other pend-

4. Smith v. National Union Fire Ins. Co., 3 N. J. Misc. 994, 130 Atl. 371 (1925).

5. Locomobile Co. v. Nichols, 84 Misc. 44, 145 N. Y. S. 941 (1914).

6. Emerson v. Western Automobile Indemnity Ass'n, 105 Kan. 242, 182 Pac. 647 (1919).

ing actions. The court held that regardless of the question of propriety, the attorney who had appeared for the injured claimant had the right to represent the assured.[7]

§ 506. Agent.—Dual capacity.—Void contract.

Right of action does not fail and the contract is not void because agent acted in a dual capacity, where the testimony showed a definite understanding by and between the assured and the agent for a certain kind of policy, even though it was not the kind or character written by the insurer.[8]

§ 507. Assignment.

The proceeds of a cause of action or judgment on a written contract must be assigned in writing in order to constitute a valid assignment, so that the judgment, when satisfied by the defendant, will operate as a bar to another action upon the contract against the defendant.[9]

§ 508. Assignment.—Oral contract.

Trial court is not warranted in substituting the assignee of an action in lieu of the plaintiff on an oral agreement.[10] If, however, the real party in interest brings the action, and the cause proceeds to trial and completion, and the jury is correctly instructed on the issues between the parties, and the court of its own motion substitutes the assignee resting on a parol agreement, without objections on the part of the real party plaintiff, who is present in court prosecuting the cause, the error is technical, and therefore, harmless.[11]

7. Maryland Casualty Co. v. Jackson et al., 230 Mass. 384, 119 N. E. 682 (1918).

8. Miller v. Head (Tex. Civ. App.), 283 S. W. 886 (1926).

9. Automobile Ins. Co. of Hartford v. Lewis, 93 Okla. 280, 220 Pac. 639, 35 A. L. R. 1463 (1923).

10. Automobile Ins. Co. of Hartford v. Lewis, 93 Okla. 280, 220 Pac. 639, 35 A. L. R. 1463 (1923).

11. Automobile Ins. Co. of Hartford v. Lewis, 93 Okla. 280, 220 Pac. 639, 35 A. L. R. 1463 (1923).

§ 509. Parties. (a) Who sustains loss.

If any loss would have been the loss of employe and not of employer, defendant employer was not to be considered as owner of car sold to employee under conditional sales contract.[12]

§ 510. Parties. (b) Conditional sales contract.

In an action by a conditional seller of an automobile on an insurance policy taken out by the conditional purchaser, plaintiff alleged that his interest exceeded the amount due on the policy, and that insured had no interest whatever. Insured was a necessary party to the action.[13]

§ 511. Parties. (c) Assignment.

Where the purchaser of an automobile under a contract retaining title in the seller until full payment of the purchase price brought suit on a policy insuring the automobile against fire after the seller had transferred his contract to a bank as collateral security, and after a rider had been attached to the policy making the insurance payable to the bank as its interest might appear, the petition was not subject to general demurrer upon the ground that the suit was not brought in the name of the party holding the legal title to the policy.[14]

§ 512. Parties. (d) Separate interests.

The liability of an automobile insurance company on its policy issued to the owner and to the assignee of the purchase contract, who financed the purchase, "as their respective interests may appear," is several and not joint, and the assignee may sue on his interest without joining the owner.[15]

12. Whitney v. Employers' Indemnity Corporation, 200 Iowa 25, 202 N. W. 236 (1925), 41 A. L. R. 495.

13. Automobile Owners' Protective Exchange of Kankakee, Ill. v. Edwards, 82 Ind. App. 558, 136 N. E. 577 (1922).

14. Simmon v. Mechanics' Insurance Co., 31 Ga. App. 137, 121 S. E. 432 (1924).

15. Strombald v. Hanover Fire Ins. Co., 121 Misc. 322, 201 N. Y. S. 67 (1923).

§ 513. Parties. (e) Joint payees.

Where complaint on automobile insurance policy disclosed that plaintiff and the discount corporation were joint payees, and that plaintiff was indebted to it in a sum which gave him the right to insure, the discount corporation was a necessary party to the suit.[16]

§ 514. Complaint. (a) Ownership.

Where complaint on fire policy alleged that at the time the policy issued plaintiff was owner of the car and that five days later while in his garage, the car was destroyed by fire, it was not fatally defective because it failed to allege plaintiff was the owner and the value at the time the loss occurred. Complaint and supporting evidence presented question for jury.[17]

§ 515. Complaint. (b) Waiver and estoppel.—Sufficiency.

Complaint was held sufficient for pleading waiver or estoppel where it alleged that insured informed defendant's agents that the insured automobile was being used for purposes forbidden by the policy; that the agent of the defendant insurance company thereupon advised the insured the matter would be taken up with the company, and in the meantime the policy would remain in full force and effect until insured was advised whether or not the insurance company would cancel the policy; that insured relied on such statement, and that the defendant, with full knowledge of the facts, intended to abandon or not to insist upon the requirements of the policy as to prohibited use of the car, and by its acts and conduct estopped itself from declaring a forfeiture for such use.[18]

16. National Fire Ins. Co. v. Gellman, 83 Ind. App. 219, 144 N. E. 154 (1924).

17. Baker v. Continental Automobile Ins. Ass'n, 111 Kan. 425, 207 Pac. 828 (1922).

18. East Side Garage v. New Brunswick F. Ins. Co., 198 App. Div. 408, 190 N. Y. S. 634 (1921).

§ 516. Amendment.—Limitation of action.

The amendment of the complaint so as to perfect the cause of action did not constitute a new cause of action so as to be barred by the limitation clause contained in the policy.[19]

§ 517. Answer. (a) Former action.

Beneficial plaintiff in suit to hold insurer of insolvent automobile operator liable for death of decedent cannot in replication deny facts found in former action for death of decedent against insured, which insurer had right to defend. The situation was the same as if insurer had been party.[20]

§ 518. Answer. (b) Limited liability.

Policy contained provision against liability while automobile was being operated by owner of automobile repair shop or automobile sales agency. Replication not denying that automobile was intrusted by owner to repairman for sale did not properly meet plea by alleging that automobile was being operated by driver in his individual capacity with permission of owner.[21]

§ 519. Answer. (c) Defense not pleaded.

Where an automobile policy protected the mortgagor of the automobile against fire or theft, and by rider, protected the mortgagee against the mortgagor's embezzlement or concealment of the machine, in an action on the policy by the mortgagee, based on the mortgagor's disappearance, the defense that the mortgagor's representations that the car was new and fully paid for were false, and that the rider referred to the original policy in such a way as to make the representations there immaterial to the rider, was not avail-

19. Troy Automobile Exchange v. Home Ins. Co., 102 Misc. 331, 169 N. Y. S. 796 (1918).

20. State v. Fidelity & Casualty Co. of N. Y. (Md.), 145 Atl. 183 (1929.)

21. State v. Fidelity & Casualty Co. of N. Y. (Md.), 145 Atl. 183 (1929).

able where no such defense was pleaded and no notice given to insured that insurer did rely on such defense.[22]

§ 520. Answer. (d) When special plea of waiver not necessary.

A special plea of waiver was not required where the parties pleaded in short by consent with leave to give in evidence any matter which if pleaded would be admissible in defense or in reply thereto.[23]

§ 521. Evidence. (a) Parol.

The rule excluding parol evidence to vary writings does not, where the execution of the written instrument has been induced by false or fraudulent statement or promises, prevent the introduction of evidence showing such facts.[24]

Where policy was issued to "Royal Tire Exchange Corp.," in action on the policy, parol evidence could be admitted to identify the individual to whom the policy was issued under such trade name.[25]

§ 522. Evidence. (b) Incendiarism.

Where facts throwing suspicion of incendiarism on insured were not pleaded, evidence could not be admitted as to such facts.[26]

§ 523. Evidence. (c) Admission.

Evidence that the insurance company's adjuster offered $1,400 to settle insured's claim was competent as admission of liability of insurance company.[27]

22. Milwaukee Mechanics' Ins. Co. v. Weathered (Tex. Civ. App.), 234 S. W. 568 (1922).

23. Yorkshire Ins. Co. v. Bunch-Morrow Motor Co., 212 Ala. 588, 103 So. 670 (1925).

24. Councill v. Sun Ins. Office of London, 146 Md. 137, 126 Atl. 229, 51 A. L. R. 29 (1924).

25. Rosenberg v. Maryland Casualty Co., 3 N. J. Misc. 1132, 130 Atl. 726 (1925).

26. Walker v. Fireman's Fund Ins. Co., 114 Ore. 545, 234 Pac. 542 (1925).

27. Davidson v. American Central Ins. Co., 80 N. H. 552, 119 Atl. 707 (1923).

§ 524. Evidence. (d) Opinion of adjuster.

An insurance company's liability is determined by the law of the case, and not what the insured or the company, or even a representative of the company may think about it. So, in an action on an automobile theft policy, evidence that adjuster of another company considered his company liable is immaterial.[28]

§ 525. Evidence. (e) Identity.

Where the plaintiff seeks to recover on a particularly described car, which the evidence fails to prove, there can be no recovery.[29]

§ 526. Evidence. (f) Conflicting.—Fraud.

Where it did not appear from the evidence, which was conflicting, whether the act of the insurer's agent in inserting incorrect statements in the application, after personal examination of the insured car, was fraudulently or inadvertently committed, it was held that fraud would not be imputed, but that it would be assumed that it was the result of a mutual mistake, and that as such it was relievable in equity.[30]

§ 527. Evidence. (g) Expert.

One who had experience as a user and dealer in trucks and who knew the truck involved in the action, could testify as an expert and his statement as to age of truck was not a conclusion.[31]

§ 528. Evidence. (h) Expert—Cause of fire.

Over the objection that no foundation had been laid, it was not error to permit an automobile mechanic of several years' experience to testify that fire may start from the

28. Northern Assur Co. v. Gross (Tex. Civ. App.), 1 S. W. 369 (1928).
29. Harris v. St. Paul Fire Marine Ins. Co., 126 N. Y. S. 118 (1920).
30. Northwestern National Ins. Co. v. Chambers, 24 Ariz. 86, 206 Pac. 1081 (1922).
31. Union Ins. Soc. of Canton v. Sudduth, 212 Ala. 649, 103 So. 845 (1925).

brake drums, that such fire is very hot, and might explode the gasoline in the tank.[32]

§ 529. Evidence. (i) Value.

Testimony by insured, a farmer, suing on a fire insurance policy covering an automobile, that he was quite familiar with what similar cars were being bought and sold for, that he inquired about them and kept in touch with cars of a similar kind and that he believed he knew the market value of cars, was a sufficient foundation for testimony as to his opinion of the value of the car destroyed.[33]

Witnesses who had been engaged in the automobile business for years and were acquainted with the insured car and with the market value of such cars, were qualified to testify as to its value.[34]

§ 530. Evidence. (j) Value—Fraud.

The fact that owner appraised his second-hand cars at a greater value than the witnesses for company or the jury did, was not conclusive evidence of fraud on his part.[35]

§ 531. Evidence. (k) Undelivered bill of sale.

Existence of undelivered bill of sale of car did not warrant submission of question of ownership in action on fire policy.[36]

§ 532. Evidence. (l) Additional insurance.

Automobile owner suing on a fire policy should have been required to answer whether he claimed anything under additional insurance of which he knew nothing until after the fire.[37]

32. Automotive Co. v. National Fire Ins. Co. of Hartford, 162 Minn. 34, 202 N. W. 32 (1925).
33. Jones v. Automotive Ins. Co., 197 Iowa 513, 197 N. W. 448 (1924).
34. Campbell v. National Fire Ins. Co. (Mo. App.), 269 S. W. 645 (1925).
35. Walker v. Fireman's Fund Ins. Co., 114 Ore. 545, 234 Pac. 542 (1925).
36. Hartford Fire Ins. Co. v. Conway, 223 Ky. 745, 4 S. W. (2d) 697.
37. Glens Falls Ins. Co. v. Jacobs, —— Ky. ——, 13 S. W. (2d) 1040 (1929).

§ 533. Evidence. (m) Sufficiency.

In an action on an auto fire policy evidence was sufficient to sustain verdict for assured as against pleas of release and wilful burning.[38]

§ 534. Evidence. (n) Policy issued subject to another.

Where "assured's memorandum of automobile insurance" recited that the policy was issued subject to an open policy issued to and in the possession of another, it was necessary for the assured to produce the original or give evidence excusing its non-production, and then offer a copy of the policy in evidence.[39]

§ 535. Evidence. (o) Process of elimination.

It was error to reject evidence offered by the insurance company to prove by a process of elimination by accounting for all of the trucks that had come into the possession of the dealer that it had never owned the trucks described.[40]

§ 536. Evidence. (p) Cancellation.

In action by conditional buyer of automobile against conditional seller for breach of contract in cancelling fire and theft insurance policy on automobile and obtaining return of premium, which was subsequently stolen, exclusion of evidence that defendant was not responsible for cancellation of policy was error. In the same case, the court held that where answer set up defense that plaintiff had recovered possession of automobile on certain date, exclusion of evidence that plaintiff had recovered possession of car by replevin on certain date was also error.[41]

38. Standard Automobile Ins. Ass'n v. Wade, 205 Ky. 788, 266 S. W. 646 (1925).

39. Smith v. National Union Fire Ins. Co., 3 N. J. Misc. 994, 130 Atl. 371 (1925).

40. Bell v. Hanover Fire Ins. Co., 107 Ore. 513, 214 Pac. 340; 215 Pac. 171 (1923).

41. Posnick v. Stedman, 219 App. Div. 610, 220 N. Y. S. 251 (1927).

§ 537. Evidence. (q) Directed verdict.

Where insurer defends on the ground of fraud and fails to submit evidence thereof, it is not error for the court to direct verdict against it.[42]

§ 538. Burden of proof.

The burden of proving that the insured stored his automobiles elsewhere than as provided for by the policy was on the insurer.[43]

Where an automobile insurance policy was issued to a conditional vendee and carried a rider which provided that loss, if any, should be payable to the conditional vendor as his interest might appear, in an action on the policy by the conditional vendor, the burden was on the plaintiff to aver and prove that the conditional vendee had complied with all the provisions of the contract; and the insurer had the right to make any defense that it would have had in an action by the conditional vendee.[44]

§ 539. Instructions. (a) Duress.

Instruction that release would not be valid if insured was induced to sign by threats and oppression of company's agent was not erroneous.[45]

§ 540. Instructions. (b) Deliberate act.

Court's instruction that insured was entitled to recover if at time of the execution of the policy and the loss, he was the owner of the insured automobile and the damage thereto was not result of any deliberate act of his, was not erroneous.[46]

42. Levy v. U. S. Fidelity & Guaranty Co. (Ill. App.), 19 Ill. Law Rev. App. Ct. Dig. 17 (1924).

43. American Central Ins. Co. v. Buchanan-Vaughan Auto. Co. (Tex. Civ. App.), 256 S. W. 610 (1924).

44. Automobile Owners' Protective Exchange of Kankakee, Ill. v. Edwards, 82 Ind. App. 588, 136 N. E. 577 (1922).

45. Reese v. Standard Auto. Ins. Ass'n, 83 Ind. App. 500, 149 N. E. 137 (1925).

46. Reese v. Standard Auto. Ins. Ass'n, 83 Ind. App. 500, 149 N. E. 137 (1925).

§ 541. Instructions. (c) Measure of recovery.

Under an automobile fire policy where the policy provided that the insurer would not be liable beyond the actual cash value of the property destroyed, it was error for the court to assume in an instruction that the measure of damages was the amount of the policy less salvage where there was an issue in the pleadings as to the value of the automobile and no evidence was introduced.[47]

§ 542. Instructions. (d) What constitutes new car.

An instruction that "although a car may have been purchased by some other person, if there had been no depreciation in its intrinsic value or its market value, it would be a new car" was not objectionable as to what constitutes a new car, or because it withdrew the question from the jury.[48]

§ 543. Instructions. (e) Waiver of defenses.

An instruction in dealing with waiver of defenses should submit the facts on which waiver is claimed to exist and not submit the bare question of law as to whether the company waived the defenses relied upon.[49]

§ 544. Jury. (a) Prejudice.

Whether insurer is prejudiced by assured's conduct is an immaterial issue, and verdict of jury based on such an issue will be reversed.[50]

§ 545. Jury. (b) Modification of policy.

Whether original policy had been modified and as so modified included fire and theft was for jury.[51]

47. Standard Automobile Ins. Ass'n v. Henson, 199 Ky. 699, 256 S. W. 414 (1924).

48. Mechanics' Ins. Co. of Philadelphia v. Teat, 34 Ga. App. 361, 129 S. E. 554 (1923).

49. Carroll v. Union Marine Ins. Co., Ltd., of Liverpool (Mo. App.), 249 S. W. 691 (1923).

50. Miller v. Union Indemnity Co., 209 App. Div. 455, 204 N. Y. S. 730 (1924).

51. Lorenz v. Bull Dog Automobile Ins. Ass'n (Mo. App.), 277 S. W. 596 (1926).

§ 546. Jury. (c) Vexatious refusal to pay loss.

The question of vexatious refusal to pay a loss under an automobile fire insurance policy was held for the jury in an action on the policy though insured demanded and sued for more than he recovered.[52]

§ 547. Jury. (d) Conflict in findings.

Where jury found in answer to special issues that damaged parts of automobile could not be replaced so as to place it in substantially as good condition as it was before the fire, and that $1,800 would be required to replace parts so as to put it in substantially as good condition as it was before the fire, and that value of automobile before fire was $2,765, and court rendered judgment for $2,400, amount of policy, irreconcilable conflict in findings required reversal of judgment.[53]

§ 548. Appeal and error. (a) Verdict of jury.

If there is any testimony that reasonably tends to support the verdict of the jury, the judgment will not be reversed on appeal.[54]

§ 549. Appeal and error. (b) Hearsay evidence.

Where the insurer admitted in its answer the existence of the contract of insurance upon which suit was instituted, and the terms thereof, it did not constitute reversible error for the trial court to admit hearsay evidence of an exhibit which purported to be a copy of the contract, and which was received through the mails, but unauthenticated, showing the relation between the signor and the insurer.[55]

52. Elliott v. Fidelity-Phenix Fire Ins. Co. of New York (Mo. App.), 267 S. W. 441 (1925).

53. Automobile Underwriters of America v. Radford (Tex. Civ. App.), 293 S. W. 869 (1927), aff'd 299 S. W. 852.

54. Automobile Ins. Co. of Hartford v. Lewis, 93 Okla. 280, 220 Pac. 639, 35 A. L. R. 1463 (1923).

55. Christiansen v. Bankers' & Shippers' Ins. Co., 49 S. D. 225, 207 N. W. 108 (1926).

§ 550. Judgment. (a) Time of payment.

Where the policy provided that the insurer would not be liable if judgment recovered against the assured was paid within ninety days from the date of such judgment, payment of judgment by the insurer within ninety days of its affirmance by the appellate court was compliance with the terms of the policy, even though payment was not made within ninety days from the date of the rendition of judgment.[56]

§ 551. Judgment. (b) Right of action—When accrues.

Under California statute[57] providing that injured judgment claimant has right of action against insurer, action is not premature when time for appeal from judgment against insured had expired, and no motion to set aside judgment was made, and no appeal taken therefrom. It is unnecessary to defer action full year under code provision.[58]

56. Taxicab Motor Co. v. Pacific Coast Casualty Co. of San Francisco, 73 Wash. 631, 132 Pac. 393 (1913).

57. California Stat. 1919, p. 776; Gen'l Laws of Cal. Act 3738.

58. Cal. C. C. P. sec. 473. See Pigg v. International Indemnity Co., 86 Cal. App. 671, 261 Pac. 486; Langley v. Zurich General Accident & Liability Ins. Co., —— Cal. App ——, 275 Pac. 963 (1929); Marple v. American Automobile Ins. Co., 82 Cal. App. 137, 255 Pac. 260 (1927); Malmgren v. Southwestern Auto. Ins. Co., 201 Cal. 29, 255 Pac. 512 (1927).

CHAPTER XIX.

REFORMATION.

SECTION.

552. In general.
553. Illustrations—Owner of equitable interest designated as assured.
554. Failure of agent to deliver full coverage policy.
555. Soliciting agent.
556. Policy written by agent who examined car.
557. Fraud of agent.
558. Transfer of car—Failure of agent to change policy.
559. By-laws.
560. Reformation denied.
561. Illustrations—Laches will prevent.
562. Failure of assured to inform broker as to his interest in insured car.
563. Procedure. (a) Erroneous description.
564. (b) Recovery cannot be had without reformation.
565. (c) Pleading.
566. (d) Mistake in engine number.
567. (e) Proof.

AN ACTION WILL LIE TO REFORM THE POLICY TO CONFORM TO THE FACTS WHERE A MUTUAL MISTAKE ON THE PART OF BOTH PARTIES WAS MADE.

§ 552. In general.

An action will lie to reform the insurance policy to conform to the facts where a mutual mistake, on the part of both parties, was made.[1] For example, in an action to re-

1. Northwestern National Ins. Co. v. Chambers, 24 Ariz. 86, 206 Pac. 1081 (1922); Browne v. Commercial Union Assurance Co., 30 Cal. App. 547, 158 Pac. 765 (1916); Mishiloff v. American Central Ins. Co., 102 Conn. 370, 128 Atl. 33 (1925); Fullerton v. United States Casualty Co., 184 Iowa 219, 167 N. W. 700 (1918), 6 A. L. R. 367; American Automoible Ins. Co. v. Shapiro, 151 Md. 383, 135 Atl. 163 (1926); Raymond v. Auto Owners' Ins. Co., 236 Mich. 393, 210 N. W. 247 (1926); Reliance Motor Co. v. St. Paul Fire & Marine Ins. Co., 165 Minn. 442, 206 N. W. 655 (1926); Vaught v. Home Ins. Co. of New York (Mo. App.), 277 S. W. 939 (1925); Lorenz v. Bull Dog Auto. Ins. Ass'n (Mo. App.), 277 S. W. 596 (1926); Robinson v. Union Automobile Ins. Co., 112 Neb. 32, 198 N. W. 166 (1924); Schenectady Varnish Co. v. Auto. Ins. Co. of Hartford, 217 N. Y. S. 504 (1926); Zap v. United States Casualty Co., 115 Misc. 634, 189 N. Y. S. 31 (1921); Tomato Products Co. v. Manufacturers' Liability Ins. Co., 203 App. Div. 678, 197 N. Y. S. 497 (1922); American Insur-

form an insurance policy so as to cover a truck which had recently been in a collision, it is not enough for insured to show that through mistake on his part the policy described a truck other than the one which was in collision, but it must be shown that the failure to describe the truck mentioned was due to a mutual mistake on the part of both the parties.[2]

§ 553. Illustrations—Owner of equitable interest designated as assured.

The court treated the policy as having been reformed in an action on the policy where the owner of an equitable interest was designated as assured instead of the owner of the legal title.[3]

§ 554. Failure of agent to deliver full coverage policy.

Where an agent authorized to solicit and sell insurance, forward applications to his company, deliver policies to insured and collect premiums, failed to deliver a full coverage policy by mutual mistake of fact, reformation was awarded. Full coverage policy was construed to mean one insuring risks of fire, theft, collision, property damage and indemnity on owner's liability.[4]

§ 555. Soliciting agent.

Assured mutually agreed with soliciting agent upon the terms and conditions of the policy, but the company omitted

ance Company v. Jueschke, 110 Okla. 250, 237 Pac. 585 (1925); Journal Co. v. General Accident Fire & Life Assur. Corp., Ltd., 188 Wis. 140, 205 N. W. 800 (1925); Merchants' & Manufacturers' Inter-Insurance Alliance v. Hansen (Tex. Civ. App.), 258 S. W. 257 (1924); Drew v. American Auto. Insurance Co. (Tex. Civ. App.), 207 S. W. 547 (1918); LeGendre v. Scottish Union & Nat. Ins. Co., 95 App. Div. 562, 88 N. Y. S. 1012; White v. Home Mut. Ins. Ass'n of Iowa, 189 Iowa 1051, 179 N. W. 315; Fitch v. City of Festus (Mo. App.), 277 S. W. 596; Caldwell v. City of New York Ins. Co. (Mo. App.), 245 S. W. 602.

2. Zap v. U. S. Casualty Co., 115 Misc. 634, 189 N. Y. S. 31 (1921).

3. American Ins. Co. v. Jueschke, 110 Okla. 250, 237 Pac. 585 (1925).

4. Merchants' & Manufacturers' Inter-Insurance Alliance v. Hansen (Tex. Civ. App.), 258 S. W. 257 (1924).

to include collision coverage, which had been agreed upon. The assured failed to read the policy, and the mistake was not discovered until after the loss occurred. Under Nebraska statute[5] which to all intents and purposes makes the soliciting agent the agent of the insurer, it was held that the policy could be reformed.[6]

§ 556. Policy written by agent who examined car.

Insured's agent told an insurance company's agent where an automobile was located and requested that the agent examine the car and insure it for all it could carry. The agent wrote a policy describing the car as new when in fact it was second-hand, and describing the car as a 1916 model when in fact it was a 1915 model. The court held that the two items were placed in the policy through mistake, inadvertence or oversight of insurer and insured.[7]

§ 557. Fraud of agent.

Contention of insurance company that errors in policy were due to fraud of the insurer's agent rather than mere mistake was not well taken where it did not appear that the errors were wilful.[8]

§ 558. Transfer of car—Failure of agent to change policy.

Where the insurer's agent is notified that the insured car had been transferred, and fails and neglects to change the policy to the name of the new owner, when such was the understanding, reformation will be allowed. The New York court has held that failure of the insurer to issue a valid policy correctly stating the name of the owner of the car did not relieve the insurer from liability.[9]

5. Nebraska Comp. St. 1922, Secs. 7757, 7772.

6. Robinson v. Union Automobile Ins. Co., 112 Neb. 32, 198 N. W. 166 (1924).

7. Northwestern National Ins. Co. v. Chambers, 24 Ariz. 86, 206 Pac. 1081 (1922).

8. Northwestern National Ins. Co. v. Chambers, 24 Ariz. 86, 206 Pac. 1081 (1922).

9. Schenectady Varnish Co. v. Automobile Ins. Co. of Hartford, 217 N. Y. S. 504 (1926).

§ 559. By-Laws.

In an application for automobile theft insurance, the assured agreed to be governed by the articles of incorporation and by-laws of the company. The insurer, without assured's knowledge, inserted in the purported application which was made a part of the policy a clause which exempted the company from liability for theft when the insured car was left unattended on the streets of a certain specified town. Local agent was in possession of the policy until after the loss of the car by theft. The court held that the policy could be reformed.[11]

§ 560. Reformation denied.

REFORMATION WILL BE DENIED WHERE THERE IS NOT A MUTAL MISTAKE OF FACT, FOR LACK OF AUTHORITY OF THE AGENT TO WRITE SUCH A POLICY, FOR LACHES, ETC.

But reformation will be denied, where there was not a mutual mistake of fact,[12] or because of lack of authority,[13] or laches.[14]

§ 561. Illustrations—Laches will prevent reformation.

Where the assured knows long before there is a loss that the policy does not cover the risk which it was agreed should be insured against, and after being so advised by the insurer, neglects to take any steps to have a new policy issued or rider attached to the policy as delivered to cover the risk, he will not be entitled to have the policy reformed after the loss.[15]

11. Johnson v. Home Ins. Ass'n, 191 Iowa 535, 181 N. W. 244 (1921).

12. American Automobile Ins. Co. v. Shapiro, 151 Md. 383, 135 Atl. 163 (1926).

13. Mississippi Electric Co. v. Hartford Fire Ins. Co., 105 Miss. 767, 63 So. 231 (1913).

14. Browne v. Commerical Union Assurance Co., 30 Cal. App. 547, 158 Pac. 765 (1916).

15. Browne v. Commercial Union Assurance Co., 30 Cal. App. 547, 158 Pac. 765 (1916).

§ 562. Failure of assured to inform broker as to his interest in insured car.

Assured's interest in an insured car was that of a conditional vendee. He had the car insured through a broker, but he did not advise the broker as to his conditional interest in the car, and the company's agent who received the application made no inquiry. The policy described the car as fully paid for and unencumbered, and contained the unconditional and sole ownership clause. There was no mutual mistake of fact. Reformation was denied.[16]

PROCEDURE.

DESCRIPTION. RECOVERY CANNOT BE HAD FOR ERRONEOUS DESCRIPTION IN POLICY WITHOUT REFORMATION.

BILL IN EQUITY. BILL IN EQUITY, UNDER SUCH CIRCUMSTANCES, WILL LIE TO REFORM THE POLICY TO CONFORM TO THE FACTS.

PROOF. MUTUAL MISTAKE MUST BE ESTABLISHED IN A CLEAR AND CONVINCING MANNER.

§ 563. Procedure. (a) Erroneous description.

In case of erroneous description in the automobile insurance policy, a bill in equity will lie to reform the policy to conform to the facts.[17]

§ 564. Procedure. (b) Recovery cannot be had without reformation.

Policy of automobile fire insurance contained widely divergent description of the insured car from the car described in proof of loss. Courts refuse recovery on such policies, as a matter of law, where misdescription relating to nature of insured property is unquestionably material. The description of the automobile in the policy and statement relating to its purchase was material warranty of insured, even though not read. It was held that to recover in such a case, if there was no intent to deceive and the

16. Mishiloff v. American Central Ins. Co., 102 Conn. 370, 128 Atl. 33 (1925).

17. Charles Hessen v. Iowa Automobile Mutual Ins. Co., 195 Iowa 141, 190 N. W. 150 (1922), 30 A. L. R. 658.

description was mistake only, the policy should be reformed. The court held that insured was not entitled to recover on the policy, as it stood.[18]

§ 565. Procedure. (c) Pleading.

An assured who knows that the policy as written and delivered does not cover the loss for which he seeks recovery and which, it is assumed, was agreed should have been covered by the policy, but due to mistake of both parties was not, should in the action on the policy ask for its reformation, and seek recovery on the policy as reformed. If assured knows before trial that the company denies liability, and does not seek to amend his complaint and ask for reformation of the contract, he will be bound by his election to stand on the contract; and assured will not thereafter be permitted to bring another and separate action for reformation, and recover on the contract as reformed.[19]

In a Minnesota case, by stipulation during the trial, the policy was reformed to cover the plaintiff who was a conditional seller rather than to cover, as it did, the buyer under a conditional sales contract.[20]

§ 566. Procedure. (d) Mistake in engine number.

It is not necessary to bring suit for reformation before suing for recovery on policy where the only mistake in description is misstatement of motor number,[22] but courts have reformed policies to correct the engine number.[23]

18. Affleck v. Potomac Ins. Co. (R. I.), 140 Atl. 469 reargument denied, 141 Atl. 183 (1928).

19. Leaksville Light & Power Co. v. Georgia Casualty Co., 193 N. C. 618, 137 S. E. 817 (1927).

20. Reliance Motor Co. v. St. Paul Fire & Marine Ins. Co., 165 Minn. 442, 206 N. W. 655 (1926).

22. Lorenz v. Bull Dog Auto. Ins. Ass'n (Mo. App.), 277 S. W. 596 (1926).

23. Vaught v. Home Ins. Co. of New York (Mo. App.), 277 S. W. 939 (1925); Tomato Products Co. v. Manufacturers' Liability Ins. Co., 203 App. Div. 678, 197 N. Y. S. 497 (1922).

§ 567. Procedure. (e) Proof—Conflict of testimony.

While reformation of insurance contract will not necessarily be denied because there is a conflict of testimony, yet upon all the proofs taking the facts as they appear to the court a mutual mistake of the parties must be established in a clear, convincing manner.[24]

24. Northwestern National Ins. Co. v. Chambers (Ariz. S. C.), 24 Ariz. 86, 206 Pac. 1081 (1922); American Automobile Ins. Co. v. Shapiro, 151 Md. 383, 135 Atl. 163 (1926); Fullerton v. United States Casualty Co., 184 Iowa 219, 167 N. W. 700 (1918); Merchants and Manufacturers Inter-Insurance Alliance v. Hansen (Tex. Civ. App.), 258 S. W. 257 (1924).

PART TWO

MATTERS PERTAINING TO SPECIAL FORMS OF AUTOMOBILE INSURANCE

CHAPTER XX.

FIRE INSURANCE.

SECTION.

568. In general.
569. Fire risks not covered.
570. Fire extinguisher.
571. Dealer's fire policies. (a) Reporting risks "as known."
572. (b) Covered until delivered to purchaser, etc.
573. Criminal misconduct.
574. Arson.
575. Conversion by insurer.
576. Valued policy—Depreciation.
577. Evidence—Authority of agent.
578. Pleading—Value—Proof—Notice.
579. Burden of proof.
580. Measure of damages.
581. Jury—Evidence.
582. Appeal and error.
583. Lessor and lessee.

§ 568. In general.

The subject of automobile fire insurance has received special consideration in each and all of the chapters included in part one of this book. Fire insurance is really the founding subject. In this chapter special matters pertaining to automobile fire insurance are presented which have not heretofore been treated.

§ 569. Fire risks not covered.

"IT IS UNDERSTOOD AND AGREED THAT THIS POLICY DOES NOT COVER LOSS OR DAMAGE CAUSED BY FIRE ORIGINATING WITHIN THE VEHICLE."

CONSTRUCTION. THE FAIR AND NATURAL IMPORT OF AUTOMOBILE FIRE INSURANCE POLICY CONTAINING THIS CLAUSE IS TO EXCLUDE LOSS BY FIRE, DANGER OF WHICH IS INHERENT IN THE USE OR OPERATION OF THE AUTOMOBILE ITSELF WITHOUT THE INTERVENTION OF ANY EXTRINSIC CAUSE OR AGENCY.

In a New York case, the automobile fire insurance policy contained the clause, "it is understood and agreed that this policy does not cover loss or damage caused by fire

originating within the vehicle." The facts in the case disclosed that the insured automobile had run into a ditch, gasoline leaked from the tank, vapor penetrated to the lighted lamps causing an explosion and the burning of the car. The court concluded that the insurance company was not liable, for "the fair and natural import of the policy was to exclude loss by fire, danger of which was inherent in the use or operation of the automobile itself without the intervention of any extrinsic cause or agency."[1]

§ 570. Fire extinguisher.

WHERE THE POLICY PROVIDES THAT THE INSURED AUTOMOBILE WILL AT ALL TIMES BE EQUIPPED WITH A FIRE EXTINGUISHER, IT CONSTITUTES A PROMISSORY WARRANTY THE BREACH OF WHICH WILL AVOID THE POLICY.

One of the conditions of the automobile fire insurance policy has been that the insured should at all times carry a fire extinguisher on the automobile, and "use diligence to maintain said fire extinguisher in full and complete working order during the life of the policy." Where the fire policy contains such a clause and it is written at a reduced premium, the condition constitutes a promissory warranty the breach of which will defeat insured's right of recovery in case of fire, even though the evidence shows that the fire extinguisher was exhausted at a previous fire and that the fire extinguisher could not have prevented the loss.[2]

§ 571. Dealer's fire policies. (a) Reporting risks "As known."

Under an automobile dealer's fire policy covering automobiles owned by dealer and held by him for sale, from the time of delivery to him to the time of delivery by him, not exceeding 12 months, and all risks to be reported to the insurer "as soon as known," 19 of the insured automobiles

1. Preston v. Aetna Ins. Co., 193 N. Y. 142, 85 N. E. 1006, 19 L. R. A. (N. S.) 133 (1908), rev. 118 App. Div. 784, 103 N. Y. S. 638.

2. Union Marine Ins. Co. v. High, 153 Ark. 156, 239 S. W. 741 (1922), 23 A. L. R. 24.

were damaged by fire. Plaintiff admitted that at least 13 of the automobiles had not been reported to the insurer "as soon as known," and that the time of reporting varied from 15 days to 17 weeks. No excuse was given for failure to report. As the policy provided that intentional failure to report a risk "as soon as known" would render the policy null and void, there could be no recovery against the insurer.[3]

An automobile dealer's insurance policy which requires the insured to make report each month as to cars owned and sold during preceding month, is forfeited by his failure to make such report for six months and until after loss.[4]

§ 572. Dealer's fire policies. (b) Covered until "delivered to purchaser or until same otherwise passes out of the possession of the insured," construed.

A dealer's open fire insurance policy provided that the policy covered an automobile until "delivered to purchaser or until same otherwise passes out of the possession of the insured." The assured, who was a dealer, loaned the automobile to one of his mechanics during his vacation at summer camp. The court construed the term "possession" to mean while the car was under the physical control of the assured or his agents within the scope of their employment, and denied to the assured right of recovery.[5]

In another case where the automobile dealer's fire policy carried the same provision, an insured car was stolen and forty-six days thereafter it was destroyed by fire. The court held that the insurer was not liable.[6]

This case was later distinguished by the same court in construing the terms of an automobile fire policy which contained a provision that the company should not be liable

3. Cass v. Lord, 236 Mass. 430, 128 N. E. 716 (1920).

4. Christian & Brough Co. v. St. Paul F. &. M. Ins. Co. (U. S. C. C. A.), 5 Fed. Rep. (2nd) 495 (1925).

5. Hunter v. Royal Ins. Co., Ltd., 209 App. Div. 15, 203 N. Y. S. 833 (1924).

6. Williams v. Fireman's Fund Ins. Co., 184 N. C. 268, 114 S. E. 161 (1922).

for loss or damage caused directly or indirectly by theft. Whether or not the loss was caused directly or indirectly by theft was a matter for final disposition by a jury. But larceny of the car *ipso facto* did not avoid the policy.[7]

Where an automobile is covered by a fire policy insuring the dealer, and during use and trial of the insured car by a prospective buyer, it is destroyed by fire, the insured's right to recover on the policy for the loss will not be defeated.[8]

§ 573. Criminal misconduct.

"LOSS THE IMMEDIATE AND DIRECT RESULT" OF THE CRIMINAL ACT OF ANY PERSON (NOT AN EMPLOYEE OR MEMBER OF INSURED'S HOUSEHOLD) APPLIED.

It has been held in a Canadian case where the automobile which was insured against fire and theft was intentionally burned while being stolen that the loss was covered by a clause in the policy insuring the owner against "loss the immediate and direct result" of the criminal act of any person (not an employee or member of insured's household).[9]

§ 574. Arson.

Where the action was to recover for the loss of an automobile by fire after it had been stolen, the evidence was that on the night that the car was alleged to have been stolen it was left in an open shed, which was located about two hundred yards from assured's house, and that the key was left hanging in the lock. The court found that the car was not stolen or accidentally burned, but that it had been taken from the shed by the assured who set it on fire.[10]

7. Osmond Barringer Co. v. Standard Fire Ins. Co., 188 N. C. 117, 123 S. E. 305 (1924).

8. Automobile Ins. Co. of Hartford v. Lewis, 93 Okla. 280, 220 Pac. 639, 35 A. L. R. 1463 (1923).

9. Rockmaker v. Motor Union Ins. Co., 52 Ont. L. Rep. 557, 70 Dom. L. R. 360 (1922).

10. Currie v. Motor Union Ins. Co., 27 Ont. Week. N. 99, affirming 26 Ont. Week. N. 126 (1924).

§ 575. Conversion by insurer.

If the insured, soon after a fire, turned the damaged car over to a mortgagee, and the insurance company ordered the mortgagee as agent of the company to store the car, thereby assuming dominion and causing storage charges to accrue against it and the car remained under control of the company until the time suit was brought without an offer to return it to the owner, an assignee of the owner and mortgagee had the election to treat such act as a conversion.[11]

§ 576. Valued policy—Depreciation.

Verdict for face of policy was not authorized where there was no evidence from which the jury could value the car which was destroyed by fire nine months after the issuance of the policy.[12]

§ 577. Evidence—Authority of agent.

Where plaintiff offered to prove loss under automobile fire policy, the insurer's agent took the car from the place where it burned and it was thereafter disposed of, such evidence was properly excluded, as it was not shown who disposed of the car or what was the authority of the agent.[13]

§ 578. Pleading—Value—proof—Notice.

In an action on a fire insurance policy, there was no allegation in the complaint as to the value of the insured car, and there was no proof as to its value except the testimony of the assured that its value was the amount to which the policy had been reduced by consent. The court held that it was the company's duty to give notice, if it intended to rely on the issue as to the value of the insured car.[14]

11. Spivy-Johnson Portrait Co. v. Belt Automobile Indemnity Ass'n, 210 Ala. 681, 99 So. 80 (1924).

12. Mechanics Insurance Co. of Philadelphia v. Teat, 34 Ga. App. 361, 129 S. E. 554 (1925).

13. Glaser v. Williamsburg City F. Ins. Co., 72 Ind. App. 319, 125 N. E. 787.

14. Harrison v. Phoenix Assurance Co., 127 S. C. 205, 120 S. E. 848 (1924).

§ 579. Burden of proof.

A person in possession of personal property is presumed to be the owner until the contrary appears. Thus, where a fire insurance company insures certain property as belonging to the insured, the burden is on the insurance company, in an action on the policy, to prove that the insured did not own the property.[15]

§ 580. Measure of damages.

Measure of damages in suit on automobile fire policy under Missouri statute is the difference between reasonable value of the car immediately before and after the fire.[16]

§ 581. Jury—Evidence.

Where the automobile was insured against loss by fire only and there was circumstantial evidence that the car had been stolen, the question was one of fact for the jury to decide.[17]

§ 582. Appeal and error.

It was error for the trial court to admit testimony of witnesses as to the value of the car sometime after the fire, when they examined it, and not on condition immediately after the fire, although there was other testimony to the effect that the car was in the same condition at the time of trial that it was immediately after the fire.[18]

§ 583. Lessor and lessee.

Where the lease agreement provided that the lessee would insure the car against loss by fire and theft and reserve to the lessor the right to do so at the lessee's expense, and the lessor thereafter notified the lessee that he had not pro-

15. Giles v. Citizens' Ins. Co., 32 Ga. App. 207, 122 S. E. 890 (1924).

16. Jarnagin v. Queen Ins. Co. of America (Mo. App.), 272 S. W. 1095 (1925).

17. Osmond Barringer Co. v. Standard F. Ins. Co., 188 N. C. 117, 123 S. E. 305 (1924).

18. Automobile Underwriters of America v. Radford (Tex. Civ. App.), 293 S. W. 869 (1927).

cured the insurance, the lessee could not then rely upon the lessor to procure the insurance, but was bound by the terms of the lease.[19]

19. Automobile Collateral Co. v. J. F. Huntzinger Co., 102 N. J. L. 430, 131 Atl. 896 (1926).

CHAPTER XXI.

THEFT INSURANCE.

SECTION.
584. In general.
585. Interpretation.
586. Definition.
587. Intent.
588. Illustrations. (a) Wife.
589. (b) Seller's instructor.
590. (c) Gardener.
591. (d) Unknown.
592. (e) One who claims ownership.
593. (f) Garage employee.
594. (g) Chauffeur.
595. (h) "Joy rider".
596. (i) Abandonment.
597. Fraudulent trick, scheme or device consituting theft. (a) In general.
598. (b) Common law.
599. (c) Statute.
600. (d) Prevailing rule.
601. (e) Illustrations. (e1) Worthless check.
602. (e2) Borrowing.
603. (e3) Renting.
604. (e4) Bailee.
605. (e5) Conditional sales.
606. Evidence of theft. (a) In general.
607. (b) Illustrations. (b1) Presumption.
608. (b2) Prima facie proof.
609. (b3) Unsupported evidence of assured.
610. (b4) Conversion.
611. (b5) Borrower.
612. (b6) "Joy rider".
613. (b7) Employee.
614. (b8) Removal of spare tire.
615. (b9) Disappearance from garage.
616. (b10) Repair shop.
617. (b11) Boat.
618. (b12) Conditional vendee.
619. (c) Jury. (c1) In general.
620. (c2) Illustrations—Abandonment.
621. (c3) Joy rider.
622. (c4) Employee.
623. (c5) Bailee.
624. (c6) Record owner.

SECTION.

625. Measure of recovery. (a) In general.
626. (b) Converson.
627. (c) Diminution of value.
628. (d) Construction—Rider.
629. (e) Depreciating rate schedule.
630. (f) Collision.
631. (g) Loss of rectifier.
632. (h) Tools.
633. (i) Conditional purchaser.
634. (j) Possession.
635. (k) Partial loss.
636. (l) Evidence.
637. (m) Burden of proof.
638. (n) Instruction.
639. (o) Jury.
640. (p) Interest.
641. (q) Penalty and attorney fees.
642. (r) Appeal and error—Illustrations.
643. Recovery of automobile. (a) In general.
644. (b) Return of insured car—Reasonable time.
645. (c) Abandonment.
646. (d) Duty of insurer.
647. (e) Cooperation.
648. (f) Release—Consideration.
649. (g) Agent's representation.
650. (h) Solicitor fees and costs.
651. (i) Measure of damages.
652. (j) Value.
653. Locking device. (a) In general.
654. (b) General rule.
655. (c) Illustrations.
656. (d) Exception—Where premium is not reduced.
657. (e) Supended.
658. (f) Due diligence.
659. (g) Jury.
660. (h) Construction.
661. (i) Descriptive.
662. (j) Defense.
663. (k) Subrogation.
664. (l) Waiver. (1) Condition subsequent.
665. (2) Adjuster.
666. (3) Retaining premium—Knowledge of breach.
667. (4) Payment to mortgagee.
668. (m) Pleading—Burden of proof.
669. (n) Evidence—Harmless error.
670. (o) Finding—Vexatious delay.
671. Carrying passengers for hire. (a) Application.
672. (b) Duty of insured.

SECTION.
673. (c) Knowledge.
674. (d) Diligence alone not sufficient.
675. (e) Suspended.
676. (f) Rented.
677. (g) Evidence.
678. Insuring against theft except by a person or persons in assured's household. (a) In general.
679. (b) Illustrations. (b1) Nephew.
680. (b2) Caretaker.
681. (b3) Employee.
682. (b4) Volunteer.
683. (b5) Gardener.
684. (b6) Bailment.
685. (c) Evidence.
686. (d) Defense.
687. (e) Burden of proof.
688. (f) Jury—Illustrations.
689. Automobile dealer's open policy. (a) Covering until car "Delivered to the purchaser," etc.
690. (b) Burden of proof.
691. (c) Evidence.
692. (d) Measure of recovery.
693. Procedure. (a) In general.
694. (b) Parties.
695. (c) Pleading—Title and ownership.
696. (d) Evidence. (d1) Immateriality.
697. (d2) Fraud—Parol evidence.
698. (d3) Proof.
699. (e) Matters of defense. (e1) Policy condition.
700. (e2) Gross negligence.
701. (e3) Exchange of cars.
702. (f) Burden of proof.
703. (g) Jury—Fraud.

§ 584. In general.

Automobile theft insurance is usually written in combination with the fire policy. The theft coverage is obtained by extending the fire contract to cover the following perils: "Theft, robbery or pilferage, excepting by any person or persons in the assured's household or in the assured's service or employment, whether the theft, robbery or pilferage occur during the hours of such service or employment or not, and excepting also the wrongful conversion, embezzlement, or secretion by a mortgagor or vendee in possession

under mortgage, conditional sale or lease agreement, and excepting in any case, other than in case of the theft of the entire automobile described herein, the theft, robbery or pilferage of tools and repair equipment." [1]

§ 585. Interpretation.

THE WORDS "THEFT, ROBBERY OR PILFERAGE" USED IN A POLICY OF INSURANCE AS DESCRIPTIVE OF THE "PERILS INSURED AGAINST" ARE TO BE GIVEN THE MEANING ATTRIBUTABLE TO THEM IN COMMON USE, BY PERSONS IN ORDINARY WALKS OF LIFE.

The words "theft, robbery or pilferage," as used in the automobile insurance policy, are to be given the meaning usually attributed to them by persons in the ordinary walks of life.[2] Even though the facts in the case may prove statutory larceny, there is no liability under the automobile insurance policy unless the taking amounts to "theft" within the commonly accepted meaning of the word.[3]

§ 586. Definition.

"Theft" within the meaning of automobile insurance policy indemnifying against "theft" is synonymous with "larceny" and "pilferage" meaning "petit larceny." [4] To constitute the crime of theft, the intent accompanying the act of taking must be a criminal intent to deprive the owner of his property not temporarily, but permanently.[5] Whether there is a theft is not dependent upon the length of time that

1. Form approved by the National Convention of Insurance Commissioners at their meeting in New York, December, 1919.

2. Bloom v. Ohio Farmers' Ins. Co., 255 Mass. 528, 152 N. E. 345 (1926); Royal Ins. Co. v. Jack, 113 Ohio St. 153, 148 N. E. 923; Brady v. Norwich Union F. Ins.. Co., 47 R. I. 416, 133 Atl. 799 (1926); Glens Falls Ins. Co. v. Stewart, 127 Misc. 353, 216 N. Y. S. 149 (1926).

3. Van Vechten v. American Eagle Fire Ins. Co., 239 N. Y. 303, 146 N. E. 432, 38 A. L. R. 1115, rev. 206 App. Div. 39, 200 N. Y. S. 514 (1925).

4. Illinois Auto Ins. Exch. v. Southern Motor Sales Co., 207 Ala. 265, 92 So. 429 (1922), 24 A. L. R. 734; Phoenix Assur. Co. v. Wimbish, 12 Ga. App. 712, 78 S. E. 265 (1913); Illinois Auto Ins. Exch. v. Southern Motor Sales Co., 207 Ala. 265, 92 So. 429 (1922), 24 A. L. R. 734.

5. Valley Mercantile Co. et al. v. St. Paul F. & M. Ins. Co., 49 Mont. 430, 143 Pac. 559 (1914), L. R. A. 1915B, 327, Ann. Cas. 1916A, 1126.

the property is converted, nor the extent of the use to which the thief is able to put it, if possession is actually taken by a wrongdoer; for intent to steal can be inferred, even though possession is but temporary.[6]

Theft has been defined by statute as "the fraudulent taking of corporeal personal property belonging to another from his possession, or from the possession of some person holding the same for him, without his consent, with intent to deprive the owner of the value of the same, and to appropriate it to the use or benefit of the person taking."[7]

§ 587. Intent.

ASSURED IS USUALLY REQUIRED TO SHOW, TO RECOVER ON AUTOMOBILE "THEFT" INSURANCE POLICY, THAT THE CAR WAS TAKEN WITH A FELONIOUS INTENT TO STEAL.

THE TAKING BY PERSONS WHO INTEND TO USE THE CAR TEMPORARILY, WITH NO INTENT TO STEAL, USUALLY IS NOT "THEFT" WITHIN THE MEANING OF THE POLICY.

Under a policy insuring an automobile against "theft, robbery or pilferage," the insured in order to recover must show that the car was taken with a felonious intent to deprive the owner of it. There can be no recovery under such a policy where there is no intent to steal the car by the one who takes it.[8] The taking by persons who intend to use

6. Price v. Royal Ins. Co., Ltd. of Liverpool, 119 Wash. 93, 204 Pac. 803 (1922); 24 A. L. R. 731.

7. Texas Penal Code, Art. 1410.

8. FLORDIA—Phoenix Assur. Co. v. Eppstein, 73 Fla. 991, 75 So. 537, L. R. A. 1917F, 540;

GEORGIA—Hartford F. Ins. Co. v. Wimbish, 12 Ga. App. 712, 78 S. E. 265, 106 N. E. 725 (1913);

ILLINOIS—Miller v. Phoenix Assur. Co. of London, 221 Ill. App. 75 (1921);

MARYLAND—Rydstrom v. Queen Ins. Co. of America, 137 Md. 349, 112 Atl. 586 (1921); Ledvinka v. Home Ins. Co., 139 Md. 434, 115 Atl. 596 (1921), 19 A. L. R. 167;

MICHIGAN—Bird v. St. Paul F. & M. Ins. Co., 218 Mich. 266, 187 N. W. 265 (1922);

MONTANA—Valley Merc. Co. v. St. Paul F. & M. Ins. Co., 49 Mont. 430, 143 Pac. 559, L. R. A. 1915B, 327, Ann. Cas. 1916A, 1126 (1914);

NEW YORK—Delafield v. London & Lancashire Fire Ins. Co., 177 App. Div. 477, 164 N. Y. S. 221 (1917); Rush v. Boston Ins. Co., 88 Misc. 48, 150 N. Y.

the car, but without intention to steal, is not covered by the policy.[9] Even the taking of the automobile by one acting under an honest belief that he is entitled to its possession, although by trick, is not theft within the meaning of the policy.[10]

A theft within the meaning of a theft insurance policy is shown if possession is actually taken by a wrongdoer and intent to steal can be inferred, even though the possession be but temporary.[11]

§ 588. Illustrations. (a) Wife.

There is no liability under an automobile theft insurance policy where wife of insured owner, from whom he was separated, appropriated the car under a claim of right from in front of a garage where she found it.[12]

§ 589. Illustrations. (b) Seller's instructor.

It was held that wrongful use unaccompanied with intent to steal the automobile is not covered by theft policy in an action where the seller furnished an instructor to show assured how to operate the car and the instructor while driving the car away on an errand of his own wrecked the car and killed himself.[13]

S. 457 (1914); Glens Falls Ins. Co. v. Stewart, 127 Misc. 353, 216 N. Y. S. 149 (1926); Schenectady Varnish Co. v. Automobile Insurance Co. of Hartford, 127 Misc. 751, 217 N. Y. S. 504 (1926); Van Vechten v. American Eagle F. Ins. Co., 239 N. Y. 303, 146 N. E. 432, 38 A. L. R. 1115, reversing 206 App. Div. 39, 200 N. Y. S. 514 (1925);

NEW JERSEY—Stewart v. Home F. & M. Ins. Co. of California, 2 N. J. Misc. 515, 124 Atl. 773 (1924);

TEXAS—Federal Ins. Co. v. Munden (Tex. Civ. App.), 203 S. W. 917 (1918);

WASHINGTON—Rapaport v. American Cent. Ins. Co., 137 Wash. 236, 242 Pac. 40 (1926).

9. Michigan Commercial Ins. Co. of Lansing v. Wills, 57 Ind. App. 256, 106 N. E. 725 (1914).

10. Rush v. Boston Ins. Co., 88 Misc. 48, 150 N. Y. S. 457 (1914).

11. Price v. Royal Insurance Co., Ltd. of Liverpool, 119 Wash. 93, 204 Pac. 803, 24 A. L. R. 731 (1922).

12. Glens Falls Ins. Co. v. Stewart, 127 Misc. 353, 216 N. Y. S. 149 (1926).

13. Ledvinka v. Home Ins. Co. of N. Y., 139 Md. 434, 115 Atl. 596 (1922), 19 A. L. R. 167.

§ 590. Illustrations. (c) Gardener.

Insurer was not liable where gardner employed by the wife of principal stockholder of corporation which was the owner of insured automobile used the car for his own pleasure purposes without the owner's knowledge, and with the intention of returning it, where the car accidentally went into a ditch and was wrecked.[14]

§ 591. Illustrations. (d) Unknown.

It was held in an Illinois case that where the insured automobile was taken from the owner's garage by someone unknown and was returned in a damaged condition, with loss of some tools, that such damage and loss did not come within the terms of the theft policy.[15]

§ 592. Illustrations. (e) One who claims ownership.

In a Missouri case, the taking was in the day time by one who claimed to be the owner. Under such circumstances the taking amounted only to a trespass, and there was not a "direct loss by burglary, theft, or larceny" within the meaning of the policy.[16]

§ 593. Illustrations. (f) Garage employee.

Although a car is wrongfully taken from a garage, where it is taken with the consent of an employee of the garage, and with the intention of returning it, there is no felonious intent, and the insurer is not liable.[17]

Where assured's automobile was damaged by a garage employee, who took it from the garage without assured's consent, there was no right of recovery on the contract insuring the automobile against theft for its taking or use

14. Schenectady Varnish Co. v. Automobile Ins. Co. of Hartford, Conn., 127 Misc. 751, 217 N. Y. S. 504 (1926).

15. Felger v. Home Ins. Co. of New York, 207 Ill. App. 492 (1917).

16. Bigus v. Pac. Coast Casualty Co., 145 Mo. App. 170, 129 S. W. 982 (1910).

17. Weir v. Central National Fire Ins. Co., 194 Iowa 446, 189 N. W. 794 (1922).

without the owner's consent, unless the taking was with the intention of stealing.[18]

Where an automobile had been left at a garage for certain repairs, an employee undertook to return it to the owner, but instead of traveling direct from the garage to the insured's home, he proceeded to his own home for his own personal purposes, and in so doing he drove the automobile over the bank, totally wrecking it. The court held that as there was no criminal intent, the company was not liable on the policy for the loss.[19]

Where the evidence showed that the employees of a painter at whose shop the car had been left for repainting, took the car out for a joy ride with the intention of bringing the car back, and did bring it back, after it had been damaged, the court held that the evidence did not show a theft within the meaning of the policy.[20]

§ 594. Illustrations. (g) Chauffeur.

There was no right of recovery under theft policy for damage to the car where former chauffeur, who had been discharged, took the car and went for a "joy ride," without intention of stealing the car.[21]

§ 595. Illustrations. (h) "Joy rider".

Where the automobile is taken for the purpose of a "joy ride," or for pleasure purposes without the consent of the owner, and there is no intent to permanently deprive the owner of the car, but the appropriator intends to return it, the taking, under such circumstances, does not constitute

18. Miller v. Phoenix Assur. Co. of London, 221 Ill. App. 75 (1921).

19. Stuht et ux v. Maryland Motor Car Ins. Co., 90 Wash. 576, 156 Pac. 557 (1916).

20. Valley Mercantile Co. v. St. Paul F. & M. Ins. Co., 49 Mont. 430, 143 Pac. 559, L. R. A. 1915B, 327, Ann. Cas. 1916A, 1126.

21. Rapaport v. American Central Ins. Co., 137 Wash. 236, 242 Pac. 40 (1926).

"theft" within the meaning of the term as used in the policy.[22]

But where an automobile was taken without the consent of the assured for a "joy ride," it has been held that the damage was the result of a theft rather than an accident.[23] The court said that the word "theft" as used in the policy should not be construed in its narrow and technical sense.

§ 596. Illustrations. (i) Abandonment.

It has been held in a Kentucky case that where a car is borrowed for the purpose of going to a particular place and instead it is driven to a distant state and there abandoned in a remote place, without the owner being notified, the owner has a right of recovery against the insurer on his theft policy.[24]

FRAUDULENT TRICK, SCHEME OR DEVICE CONSTITUTING THEFT.

ANY SCHEME, WHETHER INVOLVING FALSE PRETENSES OR OTHER FRAUDULENT TRICK OR DEVICE, WHEREBY AN OWNER OF AN AUTOMOBILE IS SWINDLED OUT OF IT WITH THE PRECONCEIVED INTENT OF THE SWINDLER NOT TO PAY FOR IT, IS THEFT BY WEIGHT OF AUTHORITY, WITHIN THE MEANING OF THE TERM AS USED IN AUTOMOBILE THEFT INSURANCE POLICY.

BUT THE MEANING OF THE TERM "THEFT" IN AN AUTOMOBILE THEFT INSURANCE POLICY IS OFTENTIMES DETERMINED IN CONFORMITY WITH THE STATUTORY DEFINITION.

22. Michigan Commercial Ins. Co. of Lansing v. Wills, 57 Ind. App. 256, 106 N. E. 725 (1914); Valley Merc. Co. v. St. Paul F. &. M. Ins. Co., 49 Mont. 430, 143 Pac. 559, L. R. A. 1915B, 327, Ann. Cas. 1916A, 1126 (1914); Phoenix Assurance Co. v. Eppstein, 73 Fla. 991, 75 So. 537 (1917), L. R. A. 1917F, 540; Rapaport v. American Central Ins. Co., 137 Wash. 236, 242 Pac. 40 (1926); Miller v. Phoenix Assur. Co. of London, 221 Ill. App. 75 (1921); Ledvinka v. Home Ins. Co., 139 Md. 434, 115 Atl. 596 (1921), 19 A. L. R. 167; Weir v. Central Nat. Fire Ins. Co., 194 Iowa 446, 189 N. W. 794 (1922).

23. Boyle v. Yorkshire Ins. Co., 56 Ont. L. Rep. 564, 2 D. L. R. 596 (1925), aff'g 1 D. L. R. 344.

24. Federal Ins. Co. v. Hiter, 164 Ky. 743, 176 S. W. 210, L. R. A. 1915E, 575 (1915).

§ 597. Fraudulent trick, scheme or device constituting theft. (a) In general.

What constitutes "theft" within the meaning of the automobile theft insurance policy, it has been held, is not theft within the meaning of the term at common law, but as provided for by statute.[25] The result is that there is a great diversity in the decisions of the different states as to the meaning of the term. The better rule, regardless of statute, would seem to be that which has been laid down in the state of New York, to wit, the commonly accepted meaning of the word.[26] Thus, in a New York case, the court said: "While the policy insures against 'theft,' it seems clear that it was not the intention of the parties to the contract of insurance to insure against larceny by trick and device; that is theft, the commission of which involves as an essential element, the deception of the insured, resulting in a surrender of the possession of his property. The term "theft" as used in the policy, does not include all forms of larceny recognized by law. It does not include a larceny perpetrated as this was under the form and guise of a business transaction, consented to by the insured himself.[27]

§ 598. Fraudulent trick, scheme or device constituting theft. (b) Common law.

At common law, if one secures the possession of a chattel,

25. James v. Phoenix Assurance Co., 75 Colo. 209, 225 Pac. 213 (1924); Overland-Reno Co. v. International Indemnity Co., 111 Kan. 668, 208 Pac. 548 (1922), re-aff'd, 115 Kan. 137, 222 Pac. 122 (1924); Nelson v. National Automobile Ins. Co., 113 Neb. 553, 204 N. W. 55 (1925); Home Ins. Co. v. Paul, 128 Okla. 142, 261 Pac. 927; Royal Insurance Co. v. Jack, 113 Ohio St. 153, 148 N. E. 923 (1925); Brady v. Norwich Union Fire Ins. Co., 47 R. I. 416, 133 Atl. 799 (1926); Automobile Underwriters' Co. v. Rhinehold (Tex. Civ. App.), 255 S. W. 1116 (1923); Southern Casualty Co. v. Landry (Tex. Civ. App.), 266 S. W. 804 (1924); Security Ins. Co. v. Sellers-Sammons-Signor Motor Co. (Tex. Civ. App.), 235 S. W. 617 (1921).

26. Van Vechten v. American Eagle Fire Ins. Co., 239 N. Y. 303, 146 N. E. 432, rev'g 206 App. Div. 39, 200 N. Y. S. 514 (1925).

27. Delafield v. London & Lancashire Fire Ins. Co., 177 App. Div. 477, 164 N. Y. S. 221.

not the title thereto or a special property therein, by or with the consent of the owner, through a fraudulent trick or device, then intending to steal the chattel, it is larceny.[28]

The doctrine is well established, that where the owner intends to transfer not the possession merely, but also the title to the property, although induced thereto by the fraud or fraudulent pretenses of the taker, the taking and carrying away do not constitute theft or larceny. Though the transaction is voidable at the election of the defrauded seller, the passing of the title to the chattel effects to prevent the act of the buyer from constituting theft or larceny of the goods of another.[29]

So it has been held that one securing title to an automobile by giving notes secured on property which he does not, but fraudulently claims to own, does not secure it by theft within the meaning of a policy insuring against loss by theft.[30]

§ 599. Fraudulent trick, scheme or device constituting theft. (c) Statute.

THEFT, WITHIN THE MEANING OF AN AUTOMOBILE THEFT INSURANCE POLICY, IS NOT NECESSARILY THE STATUTORY DEFINITION.

In a New York case, insured left his automobile at a garage and repair shop with instructions to make certain repairs. The proprietor took the car on a trip for his own purposes to another city and on the homeward journey ran it against a pole. Insured on returning to the garage, received back his damaged car, and thereupon made claim against the insurance company on the theft policy for the loss. The lower court held that since the taking by a garage

28. Illinois Auto. Ins. Exch. v. Southern Motor Sales Co., 207 Ala. 265, 92 So. 429, 24 A. L. R. 734.

29. Illinois Auto. Ins. Exch. v. Southern Motor Sales Co., 207 Ala. 265, 92 So. 429, 24 A. L. R. 734; Wharton Crim. Law, 11th Ed. 1126, 1206; Freeman's Notes, 57 Am. Dec. 278, 279, 285.

30. Illinois Auto. Ins. Exch. v. Southern Motor Sales Co., 207 Ala. 265, 92 So. 429, 24 A. L. R. 734.

man constituted statutory larceny, the insurer was liable, but the decision was reversed by the court of appeals on the ground that such unauthorized taking did not amount to a "theft" within the commonly accepted meaning of the word, or within the meaning of the policy.[31]

§ 600. Fraudulent trick, scheme or device constituting theft. (d) Prevailing rule.

The prevailing rule is that any scheme, whether involving false pretenses or other fraudulent trick or device, whereby an owner of property is swindled out of it with the preconceived intent of the swindler not to pay for it, is classed as larceny, and is punished accordingly.[32]

Thus it has been generally held that the policy against "theft, robbery or pilferage" protects the insured against the act of a swindler who deprives the insured of the automobile through a preconceived plan which involves impersonation, misrepresentation and fraud.[33] Such a species of theft, the insurer is liable for.[34] For example, in a Texas case,[35] possession of car was obtained from the dealer by the pretending buyer representing that he wished to take the car out on the hills to try it out, when as a matter of fact, his statement was false, as his intention was at the time, as the court said, to appropriate the automobile to his own use and benefit, and did so appropriate it. The court, in part, said: "The taking must be wrongful, so that if the property came into the possession of the person accused

31. Van Vechten v. American Eagle Fire Ins. Co., 239 N. Y. 303, 146 N. E. 432, 38 A. L. R. 1115, reversing 206 App. Div. 39, 200 N. Y. S. 514 (1925).

32. Hill-Howard Motor Co. v. North River Insurance Company, 111 Kan. 225, 207 Pac. 205, 24 A. L. R. 736 (1922); Overland-Reno Co. v. International Indemnity Co., 115 Kan. 137, 222 Pac. 122 (1924); Automobile Underwriters' Co. v. Rhinehold (Tex. Civ. App.), 255 S. W. 1116 (1923).

33. Hill-Howard Motor Co. v. North River Ins. Co., 111 Kan. 225, 207 Pac. 205 (1922).

34. Overland-Reno Co. v. International Ind. Co., 111 Kan. 668, 208 Pac. 548 (1922), re-aff'd, 115 Kan, 137, 222 Pac. 122 (1924).

35. Automobile Underwriters' Co. v. Rhinehold (Tex. Civ. App.). 255 S. W. 1116 (1923).

of theft by lawful means, the subsequent appropriation of it is not theft, but if the taking, though originally lawful, was obtained by any false pretext, or with any intent to deprive the owner of the value thereof, and appropriate the property to the use and benefit of the person taking, and the same is so appropriated, the offense of theft is complete."[36] The court held that the insurer was liable for the loss on the policy.

§ 601. Fraudulent trick, scheme or device constituting theft. (e) Illustrations. (e1) Worthless check.

Under general laws of the state of Rhode Island,[37] which provide that a person who shall obtain from another by false pretenses any money or property with intent to cheat or defraud shall be guilty of larceny, it has been held that the act of a person giving a false name and address, a worthless check after banking hours in purchasing an automobile on condition of immediate delivery, and then flees the state, is "theft" within the meaning of the terms of the policy. The court in the Rhode Island case said: "As this contract of insurance was made and was to be performed in this state, it is to be construed in accordance with the law of this state. The intent of the parties, as expressed in the language of the entire contract, is to be sought and given effect, if practicable. This intent is to be considered, in the absence of evidence to the contrary, to be in accord with the established law of the state, both statute and common law. If there is any uncertainty in the meaning of the words used in the contract, the party who selected such words properly should bear the burden of any disadvantage caused thereby. Plaintiff was deprived of his property by a crime. * * * Plaintiff's loss was caused by larceny. In legal and popular language Carpenter could properly

36. Tex. Crim. Stat. (Penal Code) Art. 1332.
37. Gen'l Laws 1923, Chap. 397, sec. 15.

be called a thief; he got the automobile by fraud, and took it away with intent to steal it."[38]

It has been held by the appellate court in the state of Texas that where automobile dealers permit their prospective purchasers to take an automobile in order to learn to drive it, pending the collection of check for the purchase price, or the receipt of information that the check is bad, such prospective purchaser's appropriation of the automobile amounts to a theft within the terms of the ordinary automobile theft insurance policy.[39]

Recovery can be had under a policy of insurance against "theft, robbery or pilferage," where one obtains possession of an automobile by representing that he wishes to buy a car, and makes false statements as to his identity, and by giving a fictitious check, and these fraudulent acts are committed with no intention of purchasing the automobile, but for the unlawful purpose of depriving the insured of his property.[40] But applying the construction of the term "theft" as it is usually given and understood by persons in the ordinary walks of life, it has been held in Ohio, where an owner of an automobile executes a contract for sale of the car, helps the vendee change the license numbers, and, in pursuance of this contract of sale, transfers possession and title to vendee, who pays for it with a forged check, such a fraudulent transaction so perpetrated by the vendee is not "theft" within the terms of the policy.[41]

Likewise, it has been held by an appellate court in the state of California that a policy against theft, robbery and pilferage does not cover larceny by conditional buyer, who

38. Brady v. Norwich Union Fire Ins. Soc., Ltd., 47 R. I. 416, 133 Atl. 799 (1926).

39. Security Ins. Co. v. Sellers-Sammons-Signor Motor Co. (Tex. Civ. App.), 235 S. W. 617 (1922).

40. Overland-Reno Co. v. International Indem. Co., 111 Kan. 668, 208 Pac. 548 (1922).

41. Royal Ins. Co., Ltd. v. Jack, 113 Ohio St. 153, 148 N. E. 923.

is one of parties insured, by trick or device of worthless check.[42]

§ 602. Fraudulent trick, scheme or device constituting theft. (e) Illustrations. (e2) Borrowing.

In an Illinois case, where insured's automobile was borrowed from him under pretense of towing home a friend of the insured and insured made due investigation and had no reason to disbelieve the assertions of the borrower and the automobile was never returned, it was held that the failure to return the automobile so borrowed from the owner under false pretenses constituted theft under the provision of the insurance policy.[43]

§ 603. Fraudulent trick, scheme or device constituting theft. (e) Illustrations. (e3) Renting.

Pretending to rent automobile, intending not to return it, followed by appropriation, constitutes "larceny" accompanied by fraud, and insured, under Oklahoma statute, has right to recover on theft policy.[44] So, in the state of Texas, conversion of an automobile by one to whom it has been rented, being theft under the criminal laws of the state, is a theft as that term is construed in an automobile theft insurance policy.[45]

§ 604. Fraudulent trick, scheme or device constituting theft. (e) Illustrations. (e4) Bailee.

Theft by a bailee, by weight of authority, is covered by the automobile theft insurance policy.[46] In a Colorado

42. Fisk v. Niagara Fire Ins. Co. of New York, —— Cal. App. ——, 266 Pac. 853 (1928).

43. Auerbach v. Heath (Ill. App.), 15 Ill. Law Rev. (App. Ct. Dig.) 132 (1921).

44. Okla. Comp St. Par. 2101 (1921); Home Ins. Co. v. Paul, 128 Okla. 142, 261 Pac. 927.

45. Fidelity-Phoenix Fire Ins. Co. v. Oldsmobile Sales Co. (Tex. Civ. App.), 261 S. W. 492 (1924).

46. James v. Phoenix Assurance Co., 75 Colo. 209, 225 Pac. 213 (1924); Schmid v. Heath, 173 Ill. App. 649; Ludwig v. Pacific Fire Ins. Co. of New

case, where a mortgagor of an automobile loaned the car to another, and while the car was in the possession of such bailee a third party obtained it under a false statement that he had authority from the owner to take it, and the car was damaged while in the possession of said third party, in an action by the mortgagee on the theft insurance policy covering the car, it was held that the act of the third party was a theft within the meaning of the policy.[47]

A New York court in *Ludwig v. Pacific Fire Insurance Company*[48] held that the conversion of a car by a bailee constituted a theft, within the meaning of a theft insurance policy. But this case was decided before the court of appeals decision in the case of *Van Vechten v. American Eagle Fire Insurance Company* (supra) was rendered.[49]

Even though the automobile theft insurance policy contains an exception to recovery by insured, "while the automobiles are being rented under contract or lease," the insured has the right of recovery for theft by persons who have rented automobiles where the riders attached permit the automobiles to be rented or leased.[50]

But, under the terms of the automobile policy written to indemnify the owner against loss by "theft, robbery, or pilferage", the usual and ordinary meaning of these words involving the wrongful and fraudulent taking and carrying away the article stolen have been applied, and the reasonable intention of the contract, it has been held, is not extended to cover conversion by a bailee to whom the property

York, 123 Misc. 189, 204 N. Y. S. 465 (1924); Fidelity-Phoenix Fire Ins. Co. v. Oldsmobile Sales Co. (Tex. Civ. App.), 261 S. W. 492 (1924); Security Ins. Co. v. Sellers-Sammons-Signor Motor Co. (Tex. Civ. App.), 235 S. W. 617; Home Ins. Co. v. Paul, 128 Okla. 142, 261 Pac. 927.

47. James v. Phoenix Assurance Co., 75 Colo. 209, 225 Pac. 213 (1924).

48. Ludwig v. Pacific Fire Ins. Co. of New York, 123 Misc. 189, 204 N. Y. S. 465 (1924).

49. Van Vechten v. American Eagle Fire Insurance Company, 239 N. Y. 303, 146 N. E. 432, rev. 206 App. Div. 39, 200 N. Y. 514 (1925).

50. Fidelity-Phoenix Fire Ins. Co. v. Oldsmobile Sales Co. (Tex. Civ. App.), 261 S. W. 492 (1924).

has been intrusted.[51] Thus, where a person with whom insured had left his automobile under an agreement that such person should pay insured a certain amount after he had sold the car, disposes of the car for a less sum than stated and converts the proceeds to his own use, such act is not a "theft, robbery, or pilferage" within the meaning of the terms of such a policy.[52]

§ 605. Fraudulent trick, scheme or device constituting theft. (e) Illustrations. (e5) Conditional sales.

Where the policy covers conditional vendor's interest in a car "excepting, however, the wrongful conversion or embezzlement by the vendee in possession under a conditional sale agreement," the purchase of the car by a third party through a bona fide purchaser from the conditional vendee does not constitute theft, nor does its sale by the conditional vendee. Such misconduct is embezzlement and comes within the exception provision of the policy.[53]

However, even though the policy relieves the insurance company from liability for theft while the automobile is in possession of the vendee under "conditional sale", the insurer will be liable where the owner of insured automobiles without sale being complete, allows another person to take the car for an hour or two to "true" it out, and such person does not return with the car.[54]

§ 606. Evidence of theft. (a) In general.

Such proof of theft is not required in a civil case to recover damages on an automobile theft insurance policy

51. Gunn v. Globe & Rutgers Fire Ins. Co., 24 Ga. App. 615, 101 S. E. 691 (1920).

52. Siegel v. Union Assur. Soc. Ltd. of London, 90 Misc. 550, 153 N. Y. S. 662 (1915).

53. Stewart v. Home Fire & Marine Ins. Co. of California, 2 N. J. Misc. 515, 124 Atl. 773 (1924); Continental Ins. Co. v. Dillow (Tex. Civ. App.), 273 S. W. 624 (1925).

54. Southern Casualty Co. v. Landry (Tex. Civ. App.), 266 S. W. 804 (1925).

by the assured as would be required in a criminal case.[55] The assured is not required to prove that the person who took the car intended to steal it, necessarily, but he establishes his case by evidence from which a jury can reasonably infer that the automobile had been stolen. For example, in an action on an automobile theft policy the evidence disclosed that the assured had loaned his car to a former employee for half an hour; that the car was not returned but was later found in front of a hotel in a damaged condition; the former employee had been drunk and was taken to his room in the hotel; he had the keys of the car with him when taken to his room, but they had disappeared. The court held that the evidence was sufficient to warrant the jury in finding for the insured.[56]

In another case, the assured while away from the city where he resided left the insured car with a certain person, who, after using, parked the car near the assured's office. Upon assured's returning a few hours later, the car was missing. As there were no discrepancies in the testimony of the witnesses, there was no question to submit to the jury, and the court properly directed a verdict for the assured.[57]

But circumstantial evidence does not always imply that the insured car had been stolen.

In an action on a theft automobile policy in the state of Oklahoma, the insured car was wrecked by a railroad train. The court said: "This evidence wholly fails to show that the car was stolen, but, on the contrary, the reasonable deduction to make from this evidence is that the car was not stolen, for it is not reasonable to believe that a person would steal the car and then place it on the railroad track to be wrecked." The court held the trial court erred in not sustaining the demurrer of the defendant

55. Corporation of Royal Exchange Assur. of London v. Puckett (Tex. Civ. App.), 246 S. W. 705 (1923).

56. Bird v. St. Paul F. & M. Ins. Co., 218 Mich. 266, 187 N. W. 265 (1922).

57. Stone v. American Mutual Automobile Ins. Co., 213 Mich. 194, 181 N. W. 973 (1921).

to the evidence of the plaintiff, for the reason that the plaintiff wholly failed to prove that the car was stolen.[58]

§ 607. Evidence of theft. (b) Illustrations. (b1) Presumption.

Presumption of larceny may arise from circumstantial evidence of removal of automobile from garage at night without owner's knowledge or consent, without evidence of final conversion.[59]

§ 608. Evidence of theft. (b) Illustrations. (b2) Prima facie proof.

Evidence that the automobile was left at a garage by insured at night and was gone in the morning without the consent or knowledge of anyone authorized to permit it is *prima facie* proof that the automobile was stolen and entitles insured to recover unless evidence explaining its disappearance is introduced.[60]

§ 609. Evidence of theft. (b) Illustrations. (b3) Unsupported evidence of assured.

The unsupported evidence of the assured is insufficient to prove theft of an automobile in an action on theft insurance policy.[61]

§ 610. Evidence of theft. (b) Illustrations. (b4) Conversion.

Where insured loaned the car to a person for a specific purpose, to go to a certain place, the car was taken beyond the place named and abandoned in a badly damaged condition, and was not recovered by insured for a number of weeks afterwards, it was held that the evidence showed a conversion of the machine so as to deprive the insured of its ownership, and that the insured was entitled to recover for

58. American Ins. Co. v. Jueschke, 110 Okla. 250, 237 Pac. 585 (1925).
59. Slomowitz v. Union Ins. Co. of Canton, 90 Pa. Super Ct. 366 (1927).
60. Weir v. Central Nat. Fire Ins. Co., 194 Iowa 446, 189 N. W. 794 (1922).
61. Ross v. Law Union & Rock Ins. Co., 23 Ont. Week. N. 552 (1923).

its loss, even though the person who made away with the car had not sold it.[62]

§ 611. Evidence of theft. (b) Illustrations. (b5) Borrower.

Where the alleged thief had been in the habit of borrowing the insured's car for pleasure purposes, and on the occasion in question, during the insured's absence from home, took the car and never returned it, a finding of the jury that the car was taken without the consent of the owner with the intention of stealing was justified.[63]

§ 612. Evidence of theft. (b) Illustrations. (b6) "Joy rider".

The evidence did not justify a finding of theft where a former chauffeur of the assured took the insured car from a public garage but without the consent of the assured or his wife, went for a "joy ride" about town and abandoned the car in a damaged condition, for the evidence did not show that there was any intent to permanently deprive the assured of his car.[64]

§ 613. Evidence of theft. (b) Illustrations. (b7) Employee.

The evidence was insufficient to prove theft where assured's automobile was taken from a garage by an employee, without the assured's consent, who went for a pleasure ride with his friends, and abandoned the car in a damaged condition. Intent to steal was not proved.[65]

§ 614. Evidence of theft. (b) Illustrations. (b8) Removal of spare tire.

Where the insured automobile was taken from its usual place, a spare tire removed, and the car was propelled into a quarry hole in which it would have fallen into sixty feet

62. Federal Ins. Co. v. Hiter, 164 Ky. 743, 176 S. W. 210 (1915), L. R. A. 1915E, 575.
63. Nelson v. National Auto. Ins. Co., 113 Neb. 553, 204 N. W. 55 (1925).
64. Rapaport v. American Cent. Ins. Co., 137 Wash. 236, 242 Pac. 40 (1926).
65. Miller v. Phoenix Assur. Co. of London, 221 Ill. App. 75 (1921).

of water but for catching on a rocky ledge, the evidence was sufficient to warrant a finding of deliberate theft.[66]

§ 615. Evidence of theft. (b) Illustrations. (b9) Disappearance from garage.

Where the assured delivered the insured automobile to a partner at a repair shop for repairs, never saw the car again, and called in the district attorney, sheriff and city detectives for their assistance in searching for the missing car, the evidence was sufficient to establish theft under the policy, even though the proprietor of the garage testified that he returned the car.[67]

§ 616. Evidence of theft. (b) Illustrations. (b10) Repair shop.

Evidence was sufficient to authorize recovery where insured delivered the automobile to repair shop, and thereafter, when insured returned to the shop for the car, the proprietor claimed that he had sent the car back to insured; but insured did not receive it, and even after instituting search for it with the aid of the sheriff and district attorney, could not locate it.[68]

§ 617. Evidence of theft. (b) Illustrations. (b11) Boat.

In an action on an automobile theft insurance policy the evidence was sufficient to establish a *prima facie* case where there was testimony that the plaintiff drove his automobile aboard a ferryboat, placed it close to the front, put on the emergency brake, and stopped the engine; that he went into the cabin before the boat started, and some minutes later, when the boat was out in the stream, he came out and found

66. Bloom v. Ohio Farmers' Ins. Co., 255 Mass. 528, 152 N. E. 345 (1926); See Record v. Royal Ins. Co., Ltd., 253 Mass. 617, 149 N. E. 546.

67. Corporation of Royal Exch. Assur. of London v. Puckett (Tex. Civ. App.), 246 S. W. 705 (1922).

68. Corporation of Royal Exchange Assur. of London v. Puckett (Tex. Civ. App.), 246 S. W. 705 (1923).

the car was gone; the chain at the rear of the boat was lying loose on the deck, and the gate was halfway open.[69]

§ 618. Evidence of theft. (b) Illustrations. (b12) Conditional vendee.

Where the policy insured a conditional vendor against theft, larceny, embezzlement, or conversion, the conditional vendee defaulted in his payments and disappeared with the car, the conditional vendor after considerable investigation finally located the conditional vendee and secured his arrest on a charge of larceny, the evidence was sufficient to establish conversion or theft of the car.[70]

But where vendor was insured against loss under a theft policy, as his interest may appear, on a conditional sale contract the evidence was insufficient to establish theft by the disappearance of the vendee and the car at the same time. Testimony that the car was later seen in the possession of a friend of the vendee was inclusive, for the reason that it was not disclosed under what circumstances the friend came into possession of the car.[71]

The insurer will not be liable in case the conditional sales contract is terminated. Thus, where a policy insuring a conditional vendor of an automobile against loss by conditional vendee's disposal or concealment of the automobile, and plaintiff purchased conditional vendor's interest, taking an assignment of the policy, and subsequently the conditional vendee being in default, plaintiff took possession of the car, began to use, repair and exercise exclusive control over it, and agreed to redeliver the automobile to the conditional vendee upon the payment of the sum due under the contract, plus an additional sum to plaintiff, it was held that the insurance company was not liable

69. Chepakoff v. National Ben Franklin F. Ins. Co. of Pittsburgh, 97 Misc. 330, 161 N. Y. S. 283 (1916).

70. Lozier Auto. Exchange v. Interstate Casualty Co., 197 Iowa 1130, 198 N. W. 501 (1923).

71. Continental Ins. Co. v. Dillow (Tex. Civ. App.), 273 S. W. 624 (1925).

for the theft of the car by the conditional vendee, as the conditional sale contract had been terminated.[72]

§ 619. Evidence of theft. (c) Jury. (c1) In general.

IN AN ACTION ON AUTOMOBILE THEFT INSURANCE POLICY, WHETHER OR NOT THE INSURED CAR WAS STOLEN, IS USUALLY A QUESTION OF FACT FOR THE JURY.

The question whether or not the insured car was stolen, in an action on an automobile theft insurance policy, is usually a question of fact for the jury to decide.[73]

§ 620. Evidence of theft. (c) Jury. (c2) Illustrations—Abandonment.

In an action on an automobile theft policy, whether the car had been stolen and abandoned by the thief in a damaged condition a short distance from the spot from which it had been stolen, or had started of its own accord and had run down a hill, was question for the jury.[74]

§ 621. Evidence of theft. (c)Jury. (c3) Joy rider.

Whether two persons who secretly took insured's car from his garage intended to steal it or whether they merely intended to go joy riding and return the car, held to be a question for the jury.[75]

§ 622. Evidence of theft. (c) Jury. (c4) Employee.

Where the assured's former casual employee and a friend had taken the insured automobile from the garage at night and the former had testified that the car was taken for the purpose of a "joy ride", it was properly a question for the jury.[76]

72. Skoug v. Hartford Accident and Indemnity Co. (Wash. S. C.), 124 Wash., 293, 214 Pac. 155 (1923).

73. Stone v. American Mutual Automobile Ins. Co., 213 Mich. 194, 181 N. W. 973 (1921).

74. Price v. Royal Ins. Co., 119 Wash. 93, 204 Pac. 803 (1922).

75. Wieson v. Automobile Ins. Co. of Hartford, Conn., 2 N. J. Misc. 1129, 126 Atl. 652, aff'd —— N. J. ——, 130 Atl. 921.

76. Wieson v. Automobile Ins. Co., 2 N. J. Misc. 1129, 126 Atl. 652, affirmed (N. J.), 130 Atl. 921 (1925).

§ 623. Evidence of theft. (c) Jury. (c5) Bailee.

In an action for conversion of automobile by bailee, it was held that under the evidence the question of insurer's liability was for the jury.[77]

§ 624. Evidence of theft. (c) Jury. (c6) Record owner.

Whether record owner taking automobile after replevin intended to deprive true owner of possession permanently, thus rendering insurance company liable on theft policy, held for jury.[78]

§ 625. Measure of recovery. (a) In general.

The measure of damages on an open or nonvalued automobile theft insurance policy, where there has been a total loss, is the actual market value of the automobile at the time loss occurs.[79]

Where the loss is partial, the measure of recovery is the difference between the actual market value of the insured property immediately before and after the damage or injury to the property occurs.[80]

§ 626. Measure of recovery. (b) Conversion.

Where the insured automobile is not worth the amount of the plaintiff's debt when it is wrongfully re-sold, the measure of recovery is the value of the security at the time of the conversion of the car.[81]

77. Indemnity Co. of America v. Slade, 4 S. W. (2d) 649.

78. Morris Plan Co. of R. I. v. Firemen's Fund Ins. Co. (R. I.), 141A 182.

79. Gibson v. Glens Falls Ins. Co., 111 Neb. 827, 197 N. W. 950 (1928); Finn v. Indemnity Co. of America, (Mo. App.), 297 S. W. 175 (1927); Campbell v. National Fire Ins. Co. (Mo. App.), 269 S. W. 645 (1924); Southern Casualty Co. v. Landry (Tex. Civ. App.), 266 S. W. 804 (1924); Fidelity-Phoenix F. Ins. Co. v. Oldsmobile Sales Co. (Tex. Civ. App.), 261 S. W. 492 (1924).

80. Gibson v. Glens Falls Ins. Co., 111 Neb. 827, 197 N. W. 950 (1924); Boyle v. Yorkshire Ins. Co., Ltd., 2 D. L. R. 596, 56 Ont. L. Rep. 564 (1925), aff'g 1 D. L. R. 344.

81. Automobile Finance & Securities Co. v. Globe Indemnity Co., 161 La. 303, 108 So. 545 (1926).

§ 627. Measure of recovery. (c) Diminution of value.

The provision in the automobile theft insurance policy "against direct loss or damage" by the perils of "theft, robbery, or pilferage," embraces diminution in value during the period of time that the stolen car is withheld from the possession of the assured. In such a case, it has been held in New York that the liability of the insurer under this provision of the policy is not circumscribed by the additional provision of the policy that in the event of loss or damage the company will be liable only for the actual cost of repairing, and that it is optional with the insurer to repair, rebuild or replace the property, and that there can be no abandonment to the company of the property insured.[82]

This identical question had previously presented itself to the supreme court of the state of Kentucky. The policy insured "against loss or damage if amounting to $25 or more on any single occasion by theft, robbery, or pilferage." It provided that "in the event of loss or damage under this policy this company shall be liable only for the actual cost of repairing, or, if necessary, replacing the parts damaged or destroyed." The Kentucky court also held that the latter clause did not relieve the insurer of liability for diminution in value of the automobile as the result of its theft, for to place such a construction on the policy would give no effect to the previous clause insuring the property.[83]

§ 628. Measure of recovery. (d) Construction—Rider.

Where the coverage of the rider of a policy is inconsistent with that of the policy itself, the rider will govern. In a Washington case the policy contained this proviso: "Perils insured against * * * (c) theft, robbery or pilferage, * * * excepting also the wrongful conversion, embezzlement, or secretion by a mortgagor or vendee in possession

82. Edwards v. Maryland Motor Car. Ins. Co., 204 App. Div. 174, 197 N. Y. S. 460 (1922).

83. Federal Ins. Co. v. Hiter, 164 Ky. 743, 176 S. W. 210, L. R. A. 1915E, 575.

under mortgage, conditional sale or lease agreement." The rider attached to the policy insured the "vendor against all direct loss or damage which he may sustain caused by the disposal or concealment of said vendor. * * * The legal effect of the rider was to do away with the exception as noted above, in case of theft, robbery, or pilferage.[84]

§ 629. Measure of recovery. (e) Depreciating rate schedule.

Damages for theft of an automobile, in the absence of other evidence, may be *prima facie* established, where there is a clause in the policy providing that the car's value shall be determined monthly by using a depreciation rate of not to exceed twenty-five percent a year.[85]

In an action under such a policy containing a provision that the maximum amount payable by theft should be determined by means of a schedule based on certain percentages of the car's list price, dependent upon the age, it has been held by the appellate court in the state of Missouri that the amount of recovery for theft of a second-hand car was limited by the proper percentage of the car's original sale price, which in the case in question was fifty percent for the third year, rather than by such percentage of the actual price paid by the assured.[86]

In an action on an open policy, which the South Dakota statute defined as being "one in which the value of the thing insured is not agreed upon, but is left to be ascertained in case of loss,"[87] the policy seemed to provide that the amount of recovery should be limited to ninety percent of the list price of the car at the factory, to be reduced if the list price was reduced, but as an exhibit introduced by the insurer provided that the "value of the automobile is to be determined by the market value or cash value of the auto-

84. O. M. Gaudy, Inc. v. North Carolina Home Ins. Co., 145 Wash. 375, 260 Pac. 257.

85. Lord v. Lincoln Mut. Casualty Co., 231 Ill. App. 209 (1923).

86. Koropschensky v. Goddard (Mo. App.), 266 S. W. 343 (1924).

87. South Dakota Rev. Code, sec. 1418.

mobile at the time of the loss," the limitation clause was held to be inapplicable.[88]

§ 630. Measure of recovery. (f) Collision.

Where the policy insures against theft, robbery or pilferage, the New York appellate court has held that it covers all damages directly resulting from theft which in the contemplation of the parties might result therefrom. Thus it was held to include damages caused by reckless driving or handling, and where the car was totally destroyed by a collision while in the possession of the thief, the insurer was liable for damages thus resulting.[89]

§ 631. Measure of recovery. (g) Loss of rectifier.

An automobile insurance policy insuring an automobile against loss by theft on the body, machinery and equipment, covers theft of a rectifier used in charging the battery of the automobile with electric current. The term "equipment" meaning provision of whatever is needed for efficient action or service.[90]

§ 632. Measure of recovery. (h) Tools.

Where an automobile theft policy contains the provision that the insurer excepts from the perils insured against "in any case other than in case of total loss of the automobile described herein, the theft, robbery or pilferage of tools and repair equipment," the insurer is only liable for the loss of the tools when there is a total loss of the automobile.[91]

§ 633. Measure of recovery. (i) Conditional purchaser.

It has been held in the state of New York that when an

88. Christiansen v. Bankers' & Shippers' Ins. Co., 49 S. D. 225, 207 N. W. 108 (1926).

89. Callahan v. L. & L. Fire Ins. Co., 98 Misc. 589, 163 N. Y. S. 322, aff'd 179 App. Div. 890, 165 N. Y. S. 1079 (1917).

90. Old Colony Ins. Co. v. Kolmer, 78 Ind. App. 479, 136 N. E. 51 (1922).

91. Ouimet v. National Ben Franklin Fire Ins. Co., Rap. Jud. Quebec, 58 C. S. 299, 56 D. L. R. 501 (1920).

utomobile is stolen from conditional purchaser he can re-over its full value from the insurer, although he has not aid all the purchase price.[92]

634. Measure of recovery. (j) Possession.

Recovery may be had upon an automobile theft insurance olicy even though the thief does not succeed in taking ossession of the car, where he damages the car in attempt-ng to take it from the place of storage.[93]

635. Measure of recovery. (k) Partial loss.

In an action in Minnesota on an automobile theft insurance olicy to recover damages for injury to the car and loss f equipment, which had been stolen and returned to the ssured upon recovery by the insurance company, the olicy provided that partial loss should be paid in full, rrespective of the insurable value for a total loss; that it vas optional with the insurer to return the car, and in ase the insurer exercised the option to return, it should ompensate the assured for the physical injuries to the nsured property. The insurer contended that recovery hould not exceed the difference between the insurable value f the car and its admitted value when returned, as the neasure of recovery might be under a valued policy, but he court held that the proper measure of damages was he amount of damage or loss to the car and the value of the nissing equipment.[94]

636. Measure of recovery. (l) Evidence.

In a Texas case, where the policy insured mortgagee of he car against embezzlement by the mortgagor, and the olicy required proof of the value of the car at the time f the loss, the court held as the evidence showed the market alue of the car at the time the policy was issued, and that

92. Vigliotti v. Home Ins. Co., 206 App. Div. 398, 201 N. Y. S. 407 (1923).
93. Henderson v. Northwestern Mut. Ins. Co. (B. C.), 1 D. L. R. 339 (1925).
94. Belleview Trading Co. v. International Indemnity Co., 167 Minn. 516, 08 N. W. 994 (1926).

only a few days had elapsed between the issuing of the policy and the disappearance of the mortgagor with the car, the provision was sufficiently complied with and the evidence was satisfactory.[95]

In an action to recover damages for the loss of a used car practically destroyed by fire, under a fire and theft policy, it is proper to offer evidence as to the original cost of the car, on the issue of value, but evidence as to the amount paid for the car by insured's vendor in the used car market of a distant city some thirteen months prior to the loss was too remote in point of time and place, where the evidence showed that the car had been subjected to numerous repairs and had been in constant use.[96]

In an action to recover for the loss of a used car stolen from insured's garage, under an automobile fire and theft policy, a booklet entitled "National Used Car Market Report" is properly admissible in evidence to establish the value of the car.[97]

But testimony by witness as to the value of a car stolen and destroyed by fire is inadmissible where the witness had never seen the car but based his opinion upon a table in a book published by the insurance company as to the value which the company placed upon second-hand cars of certain models and makes.[98]

§ 637. Measure of recovery. (m) Burden of proof.

In an action on a policy insuring an automobile against loss by theft, which provides that the insurance company shall not be liable beyond the actual cash value of the property at the time a loss occurs, the burden is on the assured to prove the value of the property at the time the loss occurs.[99]

95. Milwaukee Mechanics' Ins. Co. v. Weathered (Tex. Civ. App.), 234 S. W. 568 (1921).

96. Whitcomb v. Automobile Ins. Co., 167 Minn. 362, 209 N. W. 27 (1926).

97. Whitcomb v. Automobile Ins. Co., 167 Minn. 362, 209 N. W. 27 (1926).

98. Bull Dog Auto. Ins. Co. v. Crowley (Tex. Civ. App.), 281 S. W. 622 (1926).

99. Goodell v. Union Auto. Ins. Co., 111 Neb. 228, 196 N. W. 112 (1924).

The burden of proof is on the insured under an automobile theft policy to show the value of the insured car at the time of the theft. It is not sufficient to prove merely the purchase price of the car. Where the evidence does not reasonably show the value of the car at the time it was stolen, its condition at the time, or how it had been used, it is very unsatisfactory says the Oklahoma court, but it is hardly such that the court can hold that evidence as to its value is entirely lacking.[1]

638. Measure of recovery. (n) Instruction.

It has been held in a Connecticut case that exception could not be taken to an instruction that the measure of damages on an automobile theft policy was the full value of the car, less interest of insured's lessor.[2]

639. Measure of recovery. (o) Jury.

In a Minnesota case, when the theft insurance policy was written the insurance company had full information as to the model of the automobile, the factory price and the price paid for the car by the insured, all of which was written into the policy, and made a part thereof. There was no claim, in the action to recover for loss of the car, that any of the statements so made by the assured were false. The policy was for the amount of $1,200, and the verdict of the jury was for the plaintiff in the sum of $1,200. The evidence as to the value of the car was conflicting, but the court held that the question was solely for the determination of the jury, and that the verdict was not excessive.[3]

640. Measure of recovery. (p) Interest—Time of computation of.

The question was raised in an Oregon case as to the computation of interest under the policy of theft insurance on

1. Security Ins. Co. of New Haven, Conn. v. McAlister, 90 Okla. 274, 217 Pac. 430 (1923).
2. Martoni v. Mass. F. & M. Ins. Co., 106 Conn. 519, 138A. 462.
3. Dufresne v. Marine Ins. Co., 157 Minn. 390, 196 N. W. 560 (1924).

the amount that was payable thereunder. The supreme court of that state court ruled that it was error for the lower court to award interest on the amount due from the date of the policies, and held that interest runs only from the time payment is due under the policy, according to its terms.[4] This rule is well established.[5]

§ 641. Measure of recovery. (q) Penalty and attorney fees.

Where the insurance company under an automobile theft insurance policy fails to pay the loss within or at the time provided for by the policy, the assured cannot recover penalty and attorney fees under a statute which by its terms is limited to fire insurance companies only,[6] or applies to life, health, and accident insurance companies.[7]

§ 642. Measure of recovery. (r) Appeal and error—Illustrations.

The appellate court will not increase the amount of a judgment even though it is their opinion that the evidence would warrant.[8]

The trial court's finding as to the cost or value of repairs and replacements of an automobile which had been stolen will not be disturbed on appeal where the evidence is wholly conflicting.[9]

In an action on a fire and theft policy, where the insured car was stolen and found destroyed by fire, the amount payable was fifty percent of $2,397, which was the list price

4. Bell v. Hanover Fire Ins. Co., 107 Ore. 513, 214 Pac. 340, 215 Pac. 171 (1923).

5. Love v. National Liberty Ins. Co., 157 Ga. 259, 121 S. E. 648 (1924); Hartford Fire Ins. Co. v. Bernard, 99 Okla. 44, 221 Pac. 1011 (1924); Auto Underwriters of America v. Radford (Tex. Civ. App.), 293 S. W. 869 (1927).

6. Pennsylvania Fire Ins. Co. v. Johnson, 28 Ariz. 448, 237 Pac. 634.

7. National Union Fire Ins. Co. v. Crabtree, 151 Ark. 561, 237 S. W. 97 (1922); Webber v. Fidelity Lloyds of America (Tex. Civ. App.), 271 S. W. 118.

8. Bull Dog Auto. Ins. Co. v. Crowley (Tex. Civ. App.), 281 S. W. 622 (1926).

9. Belleview Trading Co. v. International Indemnity Co., 167 Minn. 516, 208 N. W. 994 (1926).

of the car. The company's books disclosed a notation that the amount of recovery should not exceed $1,070. It was held that judgment for that amount with interest, or for the sum of $1,155.60 was not excessive.[10]

Where evidence was offered as to the cost price of a stolen automobile, the time it had been in use and an expert testified that the car was of the reasonable value of $550 at the time it was stolen, although his valuation immediately prior to the loss was less than that amount, a verdict for $550 was not excessive.[11]

In an action to recover for damage to an automobile which was stolen and thereafter practically destroyed by fire, the evidence disclosed that the car was reasonably worth $3,000 at the time of the theft. After the fire, it was not worth more than $100. The policy was for $2,500. It was held that judgment for the face amount of the policy, with interest amounting to $473 and $183 salvage was not excessive or the result of the jury's passion and prejudice.[12]

Where two witnesses testified that they saw the insured automobile just before it was rented to the party who stole it, that it was practically new and was then worth $1,300; that they saw the car again after it was recovered from the thief and that it was then worth $350; although the testimony of a number of the witnesses was conflicting, the evidence was sufficient to warrant a finding that the car had been damaged in the sum of $700.[13]

RECOVERY OF AUTOMOBILE.

1. ASSURED, UNDER AN AUTOMOBILE THEFT INSURANCE POLICY CONTAINING A PROVISION THAT LOSS, IF ANY, SHALL BE PAYABLE SIXTY DAYS AFTER NOTICE AND PROOF OF LOSS, CANNOT BE COMPELLED TO ACCEPT HIS CAR WHICH HAS BEEN STOLEN AND LATER

10. Lorenz v. Bull Dog Auto. Ins. Ass'n (Mo. App.), 277 S. W. 596.

11. Christiansen v. Banker's & Shippers' Ins. Co., 49 S. D. 225, 207 N. W. 108 (1926).

12. Whitcomb v. Automobile Ins. Co., 167 Minn. 362, 209 N. W. 27 (1926).

13. Fidelity Phoenix Fire Ins. Co. v. Oldsmobile Sales Co. (Tex. Civ. App.), 261 S. W. 492 (1924).

FOUND AND RETURNED TO HIM, AFTER THE EXPIRATION OF SIXTY DAYS FROM THE TIME OF NOTICE AND PROOF OF LOSS.

2. UNDER SUCH CIRCUMSTANCES, THE ASSURED HAS RIGHT TO RECOVER THE AMOUNT OF HIS LOSS, UNAFFECTED BY SUBSEQUENT RECOVERY OF CAR BY THE INSURER.

3. ASSURED'S RIGHT OF RECOVERY, UNDER SUCH CIRCUMSTANCES, IS NOT RESTRICTED BY PROVISION OF POLICY THAT "THERE CAN BE NO ABANDONMENT TO THIS COMPANY OF THE PROPERTY DESCRIBED."

4. THE TERM "ABANDONMENT" IS INTENDED TO MEAN THAT THERE CAN BE NO VOLUNTARY ABANDONMENT BY THE OWNER BEFORE THE EXPIRATION OF THE SIXTY DAY PERIOD.

§ 643. Recovery of automobile. (a) In general.

The insured under an automobile theft insurance policy containing a provision that loss, if any, shall be payable sixty days after notice and proof of loss, cannot be compelled to accept his car which has been stolen and later found and returned to him after the expiration of sixty days from the time of notice and proof of loss.[14]

§ 644. Recovery of automobile. (b) Return of insured car—Reasonable time.

Insurer must return automobile to insured within reasonable time, where theft policy specifies no time.[15]

§ 645. Recovery of automobile. (c) Abandonment.

In the leading case of *O'Connor v. Maryland Motor Car Ins. Co.*, the policy provided that the loss should be payable within sixty days after notice and satisfactory proof of loss and that "there can be no abandonment to this company of the property described." The automobile, which was stolen, was recovered subsequent to the sixty day period. The court there held that if, after notice and satisfactory proof of loss were given, sixty days had expired before

14. O'Connor v. Maryland Motor Car. Ins. Co., 211 Ill. App. 549, aff'd, 287 Ill. 204, 122 N. E. 489 (1919), 3 A. L. R. 787; Cancilla v. Firemen's Fund Ins. Co. of San Francisco, Cal., 277 Pa. 223, 120 Atl. 824 (1923); Goldberg v. Employers' Liability Assur. Co. (Alberta Supreme Court), 66 D. L. R. 716, 1 West Week. Rep. 529 (1922).

15. Martoni v. Mass. Fire & Marine Ins. Co., 106 Conn. 519, 138 Atl. 462.

the finding and return of the automobile, the policy intended that there might be a full recovery from the company for the value of the automobile, without reference to the question of abandonment. The term "abandonment" was intended to mean that there could be no voluntary abandonment by the owner before the expiration of the sixty days.[16]

§ 646. Recovery of automobile. (d) Duty of insurer.

Under an automobile theft insurance policy the insurance company is usually required to indemnify the assured against loss. Where the insurer recovers the stolen automobile it is required to restore it to the assured at the place where the car was stolen and pay all damages to the car by reason of the theft. Thus it was held in a Missouri case that the insurance company did not discharge its obligation to the assured where on locating the car, which was stolen in Missouri and discovered in Illinois, the insurer offered to restore the car at the place of discovery and pay the damages, for under such circumstances, the assured had no means of knowing what claims or liens might be outstanding against the car or what damages it had received.[17]

Evidence that on recovery of a stolen automobile by the insurer the insurer's agent went to the attorney of assured and offered to return the car and pay the damages occasioned, and that such attorney said that he did not want the car, but wanted the money, and also showing that such attorney did not refuse to accept the car in case insurer refused to car to the place where it was stolen.[18]

§ 647. Recovery of automobile. (e) Cooperation.

Where an automobile fire and theft insurance policy provides that the loss thereunder shall be payable sixty days

16. O'Connor v. Maryland Motor Car Ins. Co., 287 Ill. 204, 122 N. E. 489 (1919), 3 A. L. R. 787.

17. Kansas City Regal Auto. Co. v. Old Colony Ins. Co., 196 Mo. App. 255, 195 S. W. 579 (1917). See Sawyer v. National Fire Insurance Co., —— S. D. ——, 220 N. W. 503 (1929).

18. Kansas City Regal Auto. Co. v. Old Colony Insurance Co., 196 Mo. App. 255, 195 S. W. 579 (1917).

after notice and proof of loss, there is no duty imposed on the assured, after the expiration of that period of time, to cooperate with the insurer in attempting to recover the car, even though it has been located. Thus, where the truck was found seventy-five days after proofs were filed, in possession of persons who claimed to be owners, it was held in a Pennsylvania case that it was no defense to an action on the policy that the assured refused to cooperate with the insurance company in instituting a replevin action to recover possession of the car. If such a defense were tenable, the court suggested that then the insurer could indefinitely postpone payment until the termination of the replevin suit. The policy contained a clause headed "repair and rebuild," but the court construed this clause to apply to loss by fire only.[19]

§ 648. Recovery of automobile. (f) Release—Consideration.

A release to an automobile insurance company was supported by sufficient consideration where executed upon condition that the company would stop its search for the stolen car where it appeared that a third party told insured that his son had taken the automobile and that he would see that it was returned or paid for.[20]

§ 649. Recovery of automobile. (g) Agent's representation.

Evidence was sufficient to warrant finding that insured's husband who, acting for her, signed a release to the insurance company without reading it, and relied implicitly on the agent's representation that it did not affect his right to look to the company if the theft resulted in a loss to him.[21]

§ 650. Recovery of automobile. (h) Solicitor fees and costs.

Where an automobile was stolen, the car sold by the thief,

19. Cancilla v. Firemen's Fund Ins. Co. of San Francisco, Cal., 277 Pa. 223, 120 Atl. 824 (1923).

20. Northwestern National Ins. Co. v. Cohen, 138 Va. 177, 121 S. E. 507 (1924).

21. Northwestern National Insurance Co. v. Cohen, 138 Va. 177, 121 S. E. 507 (1924).

recovery thereafter had by the owner, and an unsuccessful suit was prosecuted against the owner by the person to whom the car had been wrongfully sold, under a theft policy covering the automobile, the assured had no right of recovering solicitor and client costs in defending the suit, or expenses incurred in a resale of the car.[22]

§ 651. Recovery of automobile. (i) Measure of damages.

Where an automobile is stolen and recovered in the same condition that it was in when taken, the measure of damages is the expenses involved in recovering the car, and, perhaps, the value of its use during the period that the assured was deprived thereof.[23]

§ 652. Recovery of automobile. (j) Value.

Where an automobile insured under theft policy is damaged or destroyed while in the custody of the thief, the assured can recover for diminution or loss of value; if the car is wrecked or destroyed, the insurer is liable for its value.[24]

LOCKING DEVICE.

THE RULE IS, THAT UNDER A POLICY INSURING AN AUTOMOBILE AGAINST THEFT, WHICH PROVIDES THAT IN CONSIDERATION OF THE REDUCTION OF THE PREMIUM, THE CAR SHALL BE CONTINUOUSLY EQUIPPED WITH LOCKING DEVICE, AND SHALL NOT BE LEFT UNLESS THE LOCKING DEVICE IS LOCKED, THE POLICY IS NOT IN FORCE WHEN THE CAR IS LEFT WITH THE DEVICE UNLOCKED.

EXCEPTION. BUT WHERE THE APPLICATION OF THE LOCKING DEVICE WARRANTY IS MADE TO DEPEND UPON A REDUCED PREMIUM TO THE ASSURED, WHEREAS, AS A MATTER OF FACT, THE ASSURED IS CHARGED THE SAME PREMIUM, IT HAS BEEN HELD THAT THE INSURER CAN NOT RELY ON THE CLAUSE TO DEFEAT RECOVERY.

22. Bankers Financial Corp., Ltd. v. Canada Acci. & F. Assur. Co., 53 Ont. L. Rep. 620 (1923).

23. Bankers Financial Corp., Ltd. v. Canada Acci. & F. Assur. Co., 53 Ont. L. Rep. 620 (1923).

24. Bankers Financial Corp., Ltd. v. Canada Acci. & F. Assur. Co., 53 Ont. L. Rep. 620 (1923).

THE CLAUSE REQUIRING THE ASSURED TO USE ALL DILIGENCE IN LOCKING THE AUTOMOBILE WHEN LEAVING THE SAME UNATTENDED REQUIRES THE ASSURED TO USE SUCH DILIGENCE AS A MAN OF ORDINARY PRUDENCE WOULD EXERCISE UNDER SIMILAR CIRCUMSTANCES. IT PLACES UPON THE ASSURED A HIGH DEGREE OF CARE. BUT A FAILURE TO LOCK THE CAR DOES NOT NECESSARILY DEFEAT RECOVERY. IT MAY BE A QUESTION FOR THE JURY.

§ 653. Locking device. (a) In general.

The locking device endorsement or rider to an automobile theft insurance policy usually provides that in consideration of reduction in premium, the assured warrants that the insured automobile will be continuously equipped with a locking device approved by the Underwriters' Laboratories, Inc., and bearing their label, and a device for locking spare tires, similiarly approved and labeled. The assured also undertakes "to use all diligence and care in maintaining the efficiency 'of the locking device' and in locking the automobile and spare tires when leaving the same unattended."

§ 654. Locking device. (b) General rule.

The rule is, by weight of authority, that under a policy insuring an automobile against theft, which provides that in consideration of the reduction of the premium the car shall not be left unless the locking device is locked, the policy is not in force when the car is left with the device unlocked.[25]

§ 655. Locking device. (c) Illustrations.

It has been held that there was a breach of the "locking device" warranty clause, and the automobile was stolen (a) where the insured ran the car into his garage at night, and turned the key in the locking device, but left the key in the lock;"[26] (b) where the driver left the car unlocked

25. Doerr v. National Fire Ins. Co. of Hartford, Conn., 315 Mo. 266, 285 S. W. 961 (1926), rev'g 215 Mo. App. 372, 253 S. W. 39.

26. Doerr v. National F. Ins. Co. of Hartford, Conn., 315 Mo. 266, 285 S. W. 961 (1926), rev'g 215 Mo. App. 372, 253 S. W. 39.

while he went into an apartment house looking for a fare;[27] (c) and where the car was left unattended in an open place while the locking device was out of repair;[28] it is insufficient to make use of the ignition lock only.[29]

§ 656. Locking device. (d) Exception—Where premium is not reduced.

But where the application of the "locking device" warranty is made to depend upon a reduced premium to the insured, whereas, as a matter of fact, the insured is charged the same premium as though the clause was not contained in the policy, it has been held that the insurer can not rely on the clause to defeat recovery.[30]

§ 657. Locking device. (e) Suspended.

Where the assured breaches the locking device warranty of the theft insurance policy by leaving the car unlocked, the policy is not thereby forfeited, but only suspended for the period of the breach.[31]

§ 658. Locking device. (f) Due diligence.

It has been held in a North Carolina case that where an automobile theft insurance policy required insured to use all diligence and care "in locking the automobile when leaving the same unattended," it merely required the insured upon leaving the automobile unattended, to use such diligence as a man of ordinary prudence would exercise under similar circumstances, and a failure to lock the car would not necessarily defeat recovery.[32] So it was a question for the jury to determine whether or not one who left his automobile standing unlocked on an inclined driveway,

27. Ward v. Alliance Ins. Co. of Philadelphia, 55 Ont. L. Rep. 451 (1924).
28. Davis v. Yorkshire Ins. Co. (Mo. App.), 288 S. W. 80 (1926).
29. Pisciotte v. Indemnity Co. of America, 164 La. 260, 113 So. 840 (1927).
30. Camden F. Ins. Asso. v. Clayton (Tex. Civ. App.), 298 S. W. 451.
31. Doerr v. National Fire Ins. Co., 315 Mo. 266, 285 S. W. 961 (1926), rev'g 215 Mo. App. 372, 253 S. W. 39.
32. Allgood v. Hartford Fire Ins. Co., 186 N. C. 415, 119 S. E. 561 (1923), 30 A. L. R. 652.

within his yard fence, when entering the house on an errand which would require but a few minutes, complied with the provisions of the policy that he would exercise all reasonable care and diligence in looking after the car when leaving it unattended.[33]

§ 659. Locking device. (g) Jury.

In an action on an auto theft policy, the question whether insured complied with the policy requirement that he used diligence and care in locking the insured automobile when unattended was for the determination of the jury.[34]

However, the facts in the case may be so clear that the insured has violated the "locking device" warranty of the policy that it is improper for the court to submit the question to the jury. In a New Jersey case in point, the court said: "The clause in question required 'all diligence' to be used. This placed upon the assured a high degree of care. * * * Yet for two weeks after being apprised of the failure of the device to perform its functions, neither the plaintiff nor her husband did anything towards remedying the defective condition of the lock. Under these facts we think the plaintiff's diligence was a court question, not a jury question. Where the evidence shows no diligence was used, it seems absurd to leave to a jury for their determination the question of whether all diligence was used. The facts being uncontroverted, the issue became one of law for the decision of the court. The trial court, in our opinion, should have directed a verdict in favor of the defendant." [35]

§ 660. Locking device. (h) Construction.

Where the word "cars" is used in a blanket policy warranting all "cars" thereunder to be equipped with certain

33. Allgood v. Hartford Fire Ins. Co., 186 N. C. 415, 119 S. E. 561 (1923), 30 A. L. R. 652.

34. Allgood v. Hartford Fire Ins. Co., 186 N. C. 415, 119 S. E. 561 (1923), 30 A. L. R. 652.

35. Billet v. Pennsylvania F. Ins. Co., 101 N. J. L. 546, 129 Atl. 209.

locking device, it may be shown that the parties really meant passenger cars only, and not trucks.[36]

In a Missouri case where the insured was a corporation engaged in the business of making loans on automobiles, a blanket policy provided that on all cars of less price than $800, "the locking device clause attached hereto should apply." It was held that a certificate covering loss by theft of particular car within the prescribed price range, issued before the attaching of the locking device clause, was not affected either by the locking device clause afterwards attached to the policy, or by the provision of the blanket policy which permitted such a clause to be attached.[37]

§ 661. Locking device. (i) Descriptive.

But where the policy was worded that the car "is protected by Leland lock" and there was no provision in the policy that a failure to keep the lock in working condition would render the policy void, the words were merely descriptive and did not constitute a continuing or promissory warranty.[38]

§ 662. Locking device. (j) Defense.

In the absence of waiver on the part of the insurance company, breach of the "locking device" provision of the policy by failure to lock when leaving the car unattended, in consequence of which the car is stolen, constitutes a complete defense to action on the policy.[39]

§ 663. Locking device. (k) Subrogation.

There was no breach of the locking device warranty by conditional vendee under a theft policy payable as interests may appear where he left the car in the custody of the con-

36. Guaranty Plan. Corp. v. Mechanics & Traders, 6 La. App. 767 (1927).

37. Reiter v. Northwestern International Ins. Co., 211 Mo. App. 200, 243 S. W. 197 (1922).

38. Christiansen v. Bankers' & Shippers' Ins. Co., 49 S. D. 225, 207 N. W. 108 (1926).

39. Fidelity Lloyds of America v. Geddie, 116 Tex. 656, 296 S. W. 500 (1927).

ditional vendor for inspection and repair; but where, after repair work had been completed, the conditional vendor left the car parked, unlocked and unattended, on the street adjoining its place of business, from which place the car was stolen shortly afterward, there was a breach of the warranty by conditional vendor. If the insurer had paid the conditional vendee for the loss, it would have been subrogated to the right of the conditional vendee to recover against the conditional vendor. Thus, in an action by the conditional vendor as plaintiff to recover from the insurer under an assignment from the conditional vendee, there was no right of recovery against the insurer.[40]

§ 664. Locking device. (1) Waiver. (1) Condition subsequent.

The condition in an automobile theft policy that insured would not leave the car without locking the device stipulated to be maintained thereon, is a condition subsequent and may be waived.[41]

§ 665. Locking device. (1) Waiver. (2) Adjuster.

The failure to have a locking device locked when an automobile is stolen, as required by a policy insuring it against theft, is not waived by the insurer's agent referring insured to an adjuster to have the claim adjusted, which was necessary to fix the rights of a mortgagee, and the adjuster, with knowledge of the facts, offered to pay the claim if the car was not reclaimed in sixty days, and tendered the amount which the premium paid, in the unlocked condition of the car.[42]

The court further held in this case that there was no element of estoppel to be submitted to the jury where insurer failed to deny liability during the sixty day period after the theft, for the reason that it was not shown that insurer's

40. Buell v. United Firemen's Ins. Co., 167 Minn. 183, 208 N. W. 819 (1926).
41. Doerr v. National Fire Ins. Co. of Hartford, Conn., 315 Mo. 266, 285 S. W. 961 (1926), rev'g 215 Mo. App. 372, 253 S. W. 39.
42. Doerr v. National Fire Ins. Co. of Hartford, Conn., 315 Mo. 266, 285 S. W. 961 (1926), rev'g 215 Mo. App. 372, 253 S. W. 39.

failure so to do changed or altered the condition of the insured in any way.[43]

§ 666. Locking device. (1) Waiver. (3) Retaining premium—Knowledge of breach.

The Missouri court has held that where the insured automobile never had been equipped with a locking device, as required by the terms of the policy, so that the risk never attached, and thereafter for a period of more than five months, the insurance company, with knowledge of the fact, retained the premium, there was a waiver of all defenses to payment.[44] However, the same court in a later case held that where the insurance company had no knowledge of the breach of the condition of the policy until after the loss, and the automobile was in fact equipped with prescribed locking device, there was no waiver of the violation of the clause because the company retained the premium. Distinguishing the cases, the court in the later case said: "It appears to be recognized as the general rule that a return of the premium is not essential to the avoidance of an insurance contract for the breach of a condition or warranty, nor is its mere retention a waiver of such breach, especially where the insured was guilty of fraud in obtaining the insurance. But the rule is otherwise where the breach relied on as a ground of avoidance goes to the root of the whole insurance contract and avoids it from the beginning, so that no risk ever attached, and where there was no fraud in obtaining the insurance. * * * But we are not confronted here with a case in which the breach alleged as a defense avoids the insurance contract from the beginning, so that no risk ever attached. This is not a case in which the breach existed from the inception of the contract."[45]

43. Doerr v. National Fire Ins. Co. of Hartford, Conn., 315 Mo. 266, 285 S. W. 961 (1926), rev'g 215 Mo. App. 372, 253 S. W. 39.

44. Carroll v. Union Marine Ins. Co., Ltd. of Liverpool (Mo. App.), 249 S. W. 691.

45. Meyer Dairy Equipment Co. v. Conn. F. Ins. Co. (Mo. App.), 287 S. W. 663 (1926).

Return of the premium by insuring an automobile against theft is not required where, at the time of loss, the policy had run one-third of its life and covered the interest of a mortgagee, which was satisfied, while knowledge of the breach of condition in failing to maintain a locking device did not come to the insurer until after the loss.[46]

§ 667. Locking device. (l) Waiver. (4) Payment to mortgagee under "loss payable" clause.

There is no waiver of the "locking device" clause by the insurer simply because of the fact that the insured on his own account and without being requested by the insurer, submits proof of loss, but reliance upon this clause as a defense is waived where, with knowledge of its violation, the insurance company pays to the mortgagee of the car, under a "loss payable" clause, such sum as is sufficient to cover the interest of the mortgagee, even though such payment is made under mistaken belief as to the insurer's statutory liability.[47]

The Texas statute provided that the interest of a mortgagee under a fire insurance contract shall not be invalidated by any act or neglect of the mortgagee. The policy in question in this case was a fire and theft policy, but for the purposes of the action, the court considered that the policy should be construed as a theft policy alone.

Such a payment made voluntarily by the insurer to the mortgagee, with full knowledge of the violation of the "locking device" clause, where a "loss payable" mortgage clause is attached to the policy, constitutes a waiver of the breach of the warranty by the insured.[48]

§ 668. Locking device. (m) Pleading—Burden of proof.

It is not upon insured, in either pleading or proof, to

46. Doerr v. National Fire Ins. Co. of Hartford, Conn., 315 Mo. 266, 285 S. W. 961 (1926), rev'g 215 Mo. App. 372, 253 S. W. 39.

47. Webber v. Fidelity Lloyds of America (Tex. Civ. App.), 271 S. W. 118 (1925).

48. Fidelity Lloyds of America v. Geddie, 116 Tex. 656, 296 S. W. 500 (1927).

affirm compliance with requirements of locking device or to negative breach thereof; if noncompliance or breach is to be averred, it is upon insured to do it, and the burden of proving it is likewise upon insurer.[49]

§ 669. Locking device. (n) Evidence—Harmless error.

It was harmless error, if, any, for the trial court to admit exhibit showing that approved locking device was on transmission, when plaintiff had admitted that the car had transmission lock, but that he had locked only ignition lock, before car was stolen, evidence was immaterial under the issues.[50]

§ 670. Locking device. (o) Finding—Vexatious delay.

In an action on an automobile theft insurance policy, evidence that the insurance company knew that clause providing that a locking device should be maintained on automobiles was attached to the open policy after issuance of certificate of insurance, where no mistake was pleaded or proved was sufficient to support a finding of vexatious refusal of the insurance company to pay the loss.[51]

§ 671. Carrying passengers for hire. (a) Application.

Insurer, without violating any rule of public policy, can provide in its theft policy that the policy should be void if the insured car is used to carry passengers for hire.[52]

§ 672. Carrying passengers for hire. (b) Duty of insured.

Where an automobile theft insurance policy provides that the car shall not be used for carrying passengers for hire, it is the duty of the insured to see that such policy condition is not breached.[53]

49. Molnar v. Central Mut. Auto. Ins. Co. of Detroit, 242 Mich. 41, 217 N. W. 770.

50. Schwartz v. H. H. Mondon, Inc., 5 N. J. Misc. 828, 138 Atl. 516 (1927).

51. Reiter v. Northwestern International Ins. Co., 211 Mo. App. 200, 243 S. W. 197 (1922).

52. Mittet v. Home Ins. Co., 49 S. D. 319, 207 N. W. 49 (1926).

53. Mittet v. Home Ins. Co., 49 S. D. 319, 207 N. W. 49 (1926).

§ 673. Carrying passengers for hire. (c) Knowledge.

Where there is a breach of the policy provision that the automobile shall not be used for carrying passengers, the policy will be voided, even though the insured has no personal knowledge of the breach.[54]

§ 674. Carrying passengers for hire. (d) Diligence alone not sufficient.

Even though the owner of the automobile exercises due diligence in attempting to prevent the use of the car for livery purposes, and the condition is breached by the owner's son who has prohibited him from so using the car, there can be no recovery on the theft policy.[55]

§ 675. Carrying passengers for hire. (e) Suspended.

Where the policy insured the car for pleasure purposes but did not provide that any use of the car for business purposes would render the policy void, use of the car for business would not operate more than as a suspension of the policy during the period of such use.[56]

§ 676. Carrying passengers for hire. (f) Rented.

Where the policy provided that the insurer would not be liable for theft of insured car while it was being rented under contract or lease, there could be no recovery for theft by one who rented the car from the garage man with whom the assured had left it to sell, and then disappeared with it.[57]

§ 677. Carrying passengers for hire. (g) Evidence.

Testimony by the owner of the insured automobile that he had abandoned his purpose of engaging in the hacking business after securing his license and identification card,

54. Wood v. American Auto. Ins. Co., 109 Kan. 801, 202 Pac. 82 (1922).
55. Mittet v. Home Ins. Co., 49 S. D. 319, 207 N. W. 49 (1926).
56. Bloom v. Ohio Farmers' Ins. Co., 255 Mass. 528, 152 N. E. 345 (1926).
57. Brown v. International Indemnity Co., 121 Kan. 406, 247 Pac. 432 (1926).

and that the only money he had received for carrying persons in his automobile was in the case of relatives or friends who voluntarily paid him after the transportation, was held sufficient to justify the jury in finding that he did not transport passengers in the automobile.[58]

INSURER'S LIABILITY UNDER AUTOMOBILE POLICY WHICH INSURES AGAINST THEFT "EXCEPT BY A PERSON OR PERSONS IN THE ASSURED'S HOUSEHOLD."

DEFINITION—THE TERM "HOUSEHOLD" MEANS PERTAINING TO OR BELONGING TO THE HOUSE OR FAMILY. IT INCLUDES ALL DWELLERS IN A HOUSE UNDER THE COMMON CONTROL OF ONE PERSON.

§ 678. Insuring against theft except by a person or persons in assured's household. (a) In general.

The automobile theft insurance contract usually insures against "theft, robbery or pilferage, excepting by any person or persons in the assured's household". The general definition of the term "household", when used as a qualifying word, pertains to or belongs to the house or family.[59] It includes all the dwellers in a house under the common control of one person.[60]

§ 679. Insuring against theft except by a person or persons in assured's household. (b) Illustrations. (b1) Nephew.

The question raised in a Maryland case was whether the theft of the automobile by plaintiff's nephew fell within the meaning of the exception used in the contract of insurance excluding liability of the company, if the person committing the theft be in the "assured's household."

58. Marks v. Home Fire & Marine Ins. Co. of California, 52 D. C. App. Cas. 225, 285 Fed. Rep. 959 (1923).

59. Rydstrom v. Queen Ins. Co. of America, 137 Md. 349, 112 Atl. 586, 14 A. L. R. 214 (1921); Alsup & Thompson v. Jordan, 69 Tex. 304, 5 Am. St. Rep. 53, 6 S. W. 831; Huston v. State Ins. Co., 100 Iowa 402, 69 N. W. 674; Arthur v. Morgan, 112 U. S. 495, 28 L. Ed. 825, 55 Sup. Ct. Rep. 241.

60. Rydstrom v. Queen Ins. Co. of America, 137 Md. 349, 112 Atl. 586, 14 A. L. R. 214 (1921); In Re Lambson, 2 Hughes 233, Fed. Cas. No. 8,029.

The policy covered by its terms and excepted from its operation "any person in the assured's household, or in the assured's services or employment." The appellant testified that his nephew was given the freedom of the household, and it was while there he went to his uncle's room, at night, stole the switch key from his pocket, and obtained the car from the public garage. The nephew, at the time, was living in his uncle's home. "The object and purpose of an exception like the one we are here dealing with in this policy", said the court, "was to guard the company against liability for such theft as we have in this case, and to prevent fraud and collusion by and between the assured and persons in a household or in the assured's services or employment." The insurer was held not liable.[61]

§ 680. Insuring against theft except by a person or persons in assured's household. (b) Illustrations. (b2) Caretaker.

Where the automobile was insured against damage by fire theft, robbery or pilferage "by any person or persons other than those in the employment, service or household of the insured," the assured stored his car in a garage owned by a corporation of which he was president and treasurer. The car was stolen by a person who was caretaker of the building, but who was in no way entrusted with the care of the assured's car. Another employee of the garage acted as assured's chauffeur. The insurer was held liable.[62]

§ 681. Insuring against theft except by a person or persons in assured's household. (b) Illustrations. (b3) Employee.

Under the clause of the theft insurance policy that "loss * * * by theft, robbery, or pilferage by persons not in

61. Rydstrom v. Queen Ins. Co. of America, 137 Md. 349, 112 Atl. 586, 14 A. L. R. 214 (1921).

62. Callahan v. London Lancashire Fire Ins. Co., 98 Misc. 589, 163 N. Y. S. 322, aff'd 179 App. Div. 890, 165 N. Y. S. 1079 (1917).

the employment, service, or household is covered," the assured recovered where the insured car was stolen by an employee of a public garage at which the assured kept the car, paying a monthly service fee. The court said: "A servant or employee is one who engages to do a particular thing, the idea of personal service not being a necessary element in the bargain. To be in the service or employment of the assured, within the meaning of the policy, Collier (employee) must have been subject to the control and direction of the assured, and bound to render personal service to him; but he was employed, not by the assured, but by Li Bal (garage owner), and was not subject to the control of the assured, nor bound to render to him any personal service."[63]

§ 682. Insuring against theft except by a person or persons in assured's household. (b) Illustrations. (b4) Volunteer.

A chauffeur in the employ of another, who offered to wash the assured's car without compensation and obtained the keys to assured's garage for that purpose, who thereafter drove away with assured's car, without washing it and without having had any intention to wash it, was not in assured's employ within the meaning of the clause excepting the insurer from liability for theft, robbery, or pilferage "by any person or persons in the assured's household or in the assured's service or employment."[64]

§ 683. Insuring against theft except by a person or persons in assured's household. (b) Illustrations. (b5) Gardener.

A gardener, who was employed by the wife of principal stockholder of a corporation and paid for his services by her out of her independent means, was in neither the cor-

63. Schmid v. Heath, 173 Ill. App. 649 (1912).

64. Ouimet v. National Ben Franklin Fire Ins. Co., Que. C. R. 56 Dom. L. R. 501 (1920).

poration's or stockholder's service or employment, within the meaning of such a clause.[65]

§ 684. Insuring against theft except by a person or persons in assured's household. (b) Illustrations. (b6) Bailment.

Where the insured automobile was consigned to one who was purported to be in the business of selling automobiles, the relationship was one of bailment, and it did not come within the provision of the policy excepting the insurer from liability by reason of the person being in the assured's service or employment.[66]

§ 685. Insuring against theft except by a person or persons in assured's household. (c) Evidence.

It is sufficient for insured to offer evidence from which the jury can reasonably infer the theft of the car by some one not of the household or in the employ of the insured.[67]

§ 686. Insuring against theft except by a person or persons in assured's household. (d) Defense.

Defense that if the car had been stolen the theft was committed by a person in insured's employment was not sustained where the evidence disclosed that the person who took the car was an instructor employed by the seller of the car to teach the insured how to run it.[68]

§ 687. Insuring against theft except by a person or persons in assured's household. (e) Burden of proof.

In an action on a policy indemnifying the owner of an

65. Schenectady Varnish Co. v. Automobile Ins. Co. of Hartford, 127 Misc. 751, 217 N. Y. S. 504 (1926).

66. Ludwig v. Pacific Fire Ins. Co. of New York. 123 Misc. 189, 204 N. Y. S. 465 (1924).

67. Vogel and Vogel v. The Indemnity Co. of America, 18 Ill. Law Rev. (App. Ct. Dig.) 26 (1923).

68. Ledvinka v. Home Ins. Co. of N. Y., 139 Md. 434, 115 Atl. 596 (1922), 19 A. L. R. 167.

automobile against loss or damage 'by theft, robbery or pilferage by persons other than those in the employment, service, or household of the assured,'' the burden of proof is on the assured to show that the automobile was stolen by some person other than those ''in the employment, service or household of the assured.''[69] The assured, however, is not required to show who stole the car,[70] but he can prove by circumstantial evidence that it was not stolen by one in his employment, service, or household.[71]

§ 688. Insuring against theft except by a person or persons in assured's household. (f) Jury—Illustrations.

Where evidence was introduced that the insured automobile was taken by insured's former employee, it was a question of fact for determination by the jury.[72]

Whether one secretly taking an automobile from owner's garage was the owner's employe within auto theft policy not covering against theft by owner's employee, is a question for the jury.[73]

Where a person who had performed odd jobs for the assured for several years, but during the month that he took the car for a ''joy ride'' he had done nothing with the car except to take it to the garage for a new tire, and the policy provided that the insurer would not be liable for theft by an employee, this question, as well as whether there was an intent to steal, was for the jury.[74]

Where there was a question as to whether or not the automobile covered by a theft insurance policy was stolen by an

69. Kansas City Regal Automobile Co. v. Old Colony Ins. Co., 187 Mo. App. 514, 174 S. W. 153 (1915); Phoenix Assurance Co., Ltd. of London v. Eppstein, 73 Fla. 991, 75 So. 537, L. R. A. 1917F, 540; See Staten v. General Exchange Ins. Corporation of New York, 38 Ga. App. 415, 144 S. E. 53.

70. Northern Assur. Co., Ltd. v. Gross (Tex. Civ. App.), 1 S. W. (2d) 369.

71. Northern Assur. Co., Ltd. v. Gross (Tex. Civ. App.), 1 S. W. (2d) 369.

72. Slomovitz v. Union Ins. Co. of Canton, 90 Pa. Super. Ct. 366.

73. Wieson v. Auto Ins. Co. of Hartford, Conn., 2 N. J. Misc. 1129, 126 Atl. 652, aff'd (N. J.), 130 Atl. 921 (1925).

74. Wieson v. Auto Ins. Co. of Hartford, Conn., 2 N. J. Misc. 1129, 126 Atl. 652, aff'd (N. J.), 130 Atl. 921 (1925).

employee of the owner of the car, or by an employee of a corporation by which the owner was also employed, it was the duty of the judge to submit the cause to the jury to decide.[75]

The policy covered loss of an automobile "by theft by persons other than those in the employment, service or household of the assured." The automobile in question was taken out by one of the assured's salesmen in the evening after the customary hour of allowing the machine to go out for that purpose, on the representation of such salesman that he had a prospective buyer for same. This salesman called at a hotel for two out-of-town friends and took them to another hotel for dinner. The car was left in the front of the hotel along with other cars. Later when the salesman went to the sidewalk the car was missing. There was evidence to the effect that the salesman was short of money and was a heavy drinker and that on the evening the machine was lost had been drinking freely. There was no evidence to show that the persons whom the salesman took out had any intention of purchasing the machine. It was held that under this evidence whether or not there had been a theft of the machine by persons other than those in the employ of the assured was for the jury, and that the action of the court in holding as a matter of law that there was such a theft was erroneous. The jury were intitled to infer from all the evidence that the salesman had acted in bad faith and that despite his denials he was privy to the disappearance of the machine.[76]

§ 689. Automobile dealers' open policy. (a) Covering until car "delivered to the purchaser," etc.

INSURER IS LIABLE UNDER AUTOMOBILE DEALERS' OPEN POLICY COVERING CAR UNTIL "DELIVERED TO THE PURCHASER OR UNTIL SAME OTHERWISE PASSES OUT OF THE POSSESSION OF THE

75. Lower Main Street Bank et al. v. Caledonian Ins. Co., 135 S. C. 155, 133 S. E. 553 (1926).

76. Kansas City Regal Automobile Co. v. Old Colony Ins. Co., 187 Mo. App. 514, 174 S. W. 153 (1915).

ASSURED," WHERE PROSPECTIVE PURCHASER DISAPPEARED WITH CAR WHICH DEALER PERMITTED HIM TO TAKE FOR PURPOSE OF LEARNING TO DRIVE, WHILE VALIDITY OF CHECK WAS BEING INVESTIGATED.

In a Texas case, an open automobile dealers' theft policy provided that the car was insured from the time of delivery to assured until "delivered to the purchaser or until same otherwise passes out of the possession of the assured." The dealer permitted a prospective buyer to take the car for the purpose of learning how to drive while he was investigating the validity of a check, which was given for its purchase price. In the meantime, the prospective buyer disappeared with the car. The court said: "The possession so delivered was in a very qualified and limited sense; it was intended and understood to be temporary only, with the distinct recognition of the plaintiff's right to retake the property at any time, and at all events to be only of a temporary character * * * But we do not believe that the expression, 'or until same otherwise passes out of the possession of the assured,' should be interpreted as applying when the possession of the car is parted with by the owner for merely a temporary expediency, subject to be recalled at any moment, with no intention to pass title. The language used, to the effect that the insurance on each car should continue until said property is delivered to the purchaser or until same otherwise passes out of the possession of the assured, indicates that the possession otherwise passing should be of the same permanent character as that passed to a purchaser." [77]

§ 690. Automobile dealers' open policy. (b) Burden of proof.

Under an automobile dealers' open policy covering cars until "delivered to the purchaser or until same otherwise passes out of the possession of the assured," the burden

77. Security Ins. Co. v. Sellers-Sammons-Signor Motor Co. (Tex. Civ. App.), 235 S. W. 617 (1921).

of proof was on the assured to show that the car, at the time of the loss, had not passed out of his possession.[78]

§ 691. Automobile dealers' open policy. (c) Evidence.

In an action on an indemnity policy against conversion of an automobile by a conditional vendee, several months passed without the conditional purchaser making any monthly payment as required by the contract. Registered letter addressed to him at his last known address was returned marked "Returned to writer unclaimed. Moved. Left no address." Manager of the insurance company tried to locate car through the state license department, but without success. He went to Battle Creek, Iowa, where vendee had lived and to the garage where he said he kept the car, but did not find either the vendee or the car. Vendee had left with the car for unknown destination. It was held that the evidence although not strong was sufficient to present a question for the jury.[79]

§ 692. Automobile dealers' open policy. (d) Measure of recovery.

On a dealers' blanket policy covering cars sold on conditional sales contracts and insuring against loss by theft, larceny, embezzlement, or conversion, where, under the terms of the policy, the dealer furnishes the insurer at the time of each sale with the description, price and terms of each sale, the amount recoverable is the balance due on the contract of sale.[80]

78. Security Ins. Co. v. Sellers-Sammons-Signor Motor Co. (Tex. Civ. App.), 235 S. W. 617 (1921).

79. Lozier Automobile Exchange v. Interstate Casualty Co., 197 Iowa 1130, 198 N. W. 501 (1924).

80. Buxton v. International Indemnity Co., 47 Cal. App. 583, 191 Pac. 84 (1920); Lozier Auto. Exchange v. Interstate Casualty Co., 197 Iowa 1130, 198 N. W. 501 (1923).

PROCEDURE.

§ 693. Procedure. (a) In general.

Matters hereinafter presented relative to procedure are general in nature, as such matters have been specially considered under the sub-headings of this chapter.

§ 694. Procedure. (b) Parties.

Insurance company paying owners for depreciation of automobile while stolen, properly sued warehouseman, from whom it was stolen, in name of insured.[81]

Where theft insurance policy incorrectly stated the name of the vendor, the correct name could be shown.[82]

An agent of an insurance company, which had insured an automobile owner against theft, to whom, after loss under the policy had been paid, the insured had assigned his conditional contract of sale and all moneys payable thereunder, was the proper party to sue for replevin of the car.[83]

§ 695. Procedure. (c) Pleading—Title and ownership.

Where the insurance company pays a loss on an automobile theft insurance policy, and thereafter files suit to recover on the ground that there was a breach of warranty of the sole and unconditional ownership clause of the policy, to wit, that at the time the car was insured and at the time of payment of the insurance, the insured was not the owner of the car, but that it was owned by a third party from whom it had been stolen, it has been held that in the absence of fraud or bad faith there is no right of action.[84]

§ 696. Procedure. (d) Evidence. (d1) Immateriality.

The statement of a witness on behalf of the insured that

81. Smith v. United Warehouse Co., 123 Kan. 515, 255 P. 1115 (1927).
82. Simpionbato v. Royal Ins. Co., 253 Mass. 606, 149 N. E. 666 (1926).
83. Yates v. Russell, 20 Ariz. 338, 180 Pac. 910 (1919).
84. Fireman's Fund Ins. Co. of California v. Vinton (1921), 190 N. Y. S. 525, aff'd 206 App. Div. 615, 198 N. Y. S. 913 (1921).

his automobile "was stolen" was inadmissible, as being a conclusion of the witness and not a fact.[85]

In an action on an automobile theft policy, such matters as copy of estimate of repairs, complaint of patrolman charging certain party with theft of insured car, memorandum of prosecutor's office in working up the criminal case or certified copy of proceedings in court against party charged with theft of the insured automobile are not properly admissible in evidence.[86]

§ 697. Procedure. (d) Evidence. (d2) Fraud—Parol evidence.

A false promise not intended to be performed, but made to trick and deceive another into the execution of a written instrument, is a fraud, and may, in an action on the instrument, be shown by any competent evidence, whether oral or documentary. So, where one who having insured an automobile against theft, has taken possession of the car after it was stolen and recovered it in a damaged condition, and contracted for its repair, induces the owner to accept a draft and sign a receipt in full before the repairs are completed, by undertaking to see that they are completed, with no intention of performing the undertaking, parol evidence is admissible to show the fraud.[87]

§ 698. Procedure. (d) Evidence. (d3) Proof.

Where the insurer admits the existence of the contract of insurance upon which suit was instituted, and the terms of the contract, the assured's case was made out when she proved her continued ownership of the car, its loss by the assured during the life of the policy, the value of the car at the time of its loss, and full payment of note and mortgage on the car to the party holding the policy as security.[88]

85. Federal Insurance Co. v. Munden (Tex. Civ. App.), 203 S. W. 917 (1918).

86. Smith v. National Union Fire Ins. Co., 3 N. J. Misc. 994, 130 Atl. 371 (1925).

87. Councill v. Sun Insurance Office of London, 146 Md. 137, 126 Atl. 229, 51 A. L. R. 29 (1924).

88. Christiansen v. Bankers & Shippers' Ins. Co., 49 S. D. 225, 207 N. W. 108 (1926).

§ 699. Procedure. (e) Matters of defense. (e1) Policy condition.

To recover owner of stolen automobile was not obliged to whom compliance with condition in policy, but insurer must give such defense in plea.[89]

§ 700. Procedure. (e) Matters of defense. (e2) Gross negligence.

Breach of provision in theft policy excusing insurance company in event of insured's gross negligence was affirmative defense required to be pleaded.[90]

§ 701. Procedure. (e) Matters of defense. (e3) Exchange of cars.

As a defense to an action for breach of contract on a theft insurance policy, it was alleged that plaintiff sold his automobile and took in part payment another automobile of the reasonable value of $450. It was held that the court erred in sustaining demurrer to this plea, for, if proved, the liability of the defendant would have been reduced that amount.[91]

§ 702. Procedure. (f) Burden of proof.

In an action on an automobile theft insurance policy, the burden of proof is on the insured to establish by a preponderance of the evidence that the car was stolen.[92]

Where the policy insures against loss from theft by persons other than those in insured's employ, the insured to recover has the burden of proving every element of larceny as defined by statute.[93]

89. Molnar v. Central Mut. Auto. Ins. Co. of Detroit, 242 Mich. 41, 217 N. W. 770.

90. Indemnity Company of America v. Slade (Tex. Civ. App.), 4 S. W. (2d) 649.

91. Miller v. Head (Tex. Civ. App.), 283 S. W. 886 (1926).

92. American Ins. Co. v. Jueschke, 110 Okla. 250, 237 Pac. 585.

93. Valley Merc. Co. et al. v. St. Paul F. & M. Ins. Co., 49 Mont. 430, 143 Pac. 559 (1914).

In an action by the assured against an insurance agent for not issuing the kind or character of theft insurance policy contracted for, where the evidence showed that some sort of a policy was issued and delivered to the assured, the burden of showing that the policy issued and delivered to him was not as agreed was upon the assured.[94]

Where the insurer alleged that the assured had failed to carry out the conditions of the contract of insurance in not protecting the car after it had collided with the train, the burden of proving the breach of the contract was upon the insurer.[95]

§ 703. Procedure. (g) Jury—Fraud.

Where the theft insurance policy provides that it will be void if the assured should attempt to defraud the insurer, and the insurer contended that the assured claimed a price in excess of the amount that would have been required to purchase a new car of the same kind, the question has been held to be one for the jury.[96]

The finding of a jury that the assured had not fraudulently procured another to steal his automobile because the person taking the car had so testified was not the result of passion, prejudice, or misconduct, for the jury could properly have been influenced to so testify to escape prosecution.[97]

94. Miller v. Head (Tex. Civ. App.), 283 S. W. 886 (1926).
95. Johnson v. United Firemen's Ins. Co., 207 App. Div. 576, 201 N. Y. S. 802 (1923).
96. Campbell v. National F. Ins. Co. 1924 (Mo. App.), 269 S. W. 645.
97. Campbell v. National F. Ins. Co. 1924 (Mo. App.), 269 S. W. 645.

CHAPTER XXII.

COLLISION INSURANCE.

SECTION.

704. In general.
705. Use and coverage.
706. Definition.
707. Maritime insurance.
708. Rule of ejusdem generis—Exception.
709. Collision—What it imports.
710. Impact with the ground.
711. Water and land.
712. Approximate cause.
713. Illustrations. (a) Breaking an axle.
714. (b) Striking a stump.
715. (c) Striking a tree.
716. Roadbed.
717. Same—Exclusion clause.
718. Contact with embankment, ditch or ledge.
719. (a) Embankment.
720. (b) Ditch.
721. (c) Ledge.
722. Rut.
723. Washout.
724. Shoulder of pavement.
725. Curbing.
726. Upsets.
727. (a) Quick application of brakes.
728. (b) Car settling in soft ground.
729. (c) Short turn while driving rapidly.
730. Contact with bridge.
731. Skidding.
732. Fall of scoop upon truck.
733. Falling down elevator shaft.
734. Collapse of building.
735. Driving in violation of law.
736. Age of driver.
737. Bumpers—Promissory warranty.
738. Negligence of third party.
739. Measure of damages. (a) Contract of indemnity.
740. (b) "Actual cost of repairing or replacing parts damaged or destroyed" construed.
741. (c) Conditional vendor.
742. (d) Value of property.
743. Evidence. (a) Accidental.
744. (b) Expert testimony.

SECTION.

745. (c) Amount of damages—Jury.
746. (d) Total loss.
747. (e) Dismissal.
748. (f) "Suitable repair and replace."
749. Burden of proof.
750. Erroneous instruction.
751. Loss sustained—Payment of judgment.

§ 704. In general.

Collision insurance, until the advent of the automobile, was practically, if not wholly, confined to maritime insurance. The decisions, not only in maritime insurance, but also in automobile insurance, are far from uniform. But the meaning of the term "collision" as defined in maritime cases, in a large way, has pointed the way for a proper understanding and interpretation of the automobile collision endorsement.

§ 705. Use and coverage.

The collision coverage is seldom, if ever, used by itself alone. Rather, it is used as an endorsement on the fire or public liability automobile policy. The collision endorsement usually covers "against actual loss or damage to the automobile insured, including its operating equipment, if caused solely by accidental collision with another object, excluding, however, loss or damage caused directly or indirectly by fire, and loss or damage to any tires due to puncture, cut, gash, blowout, or other ordinary tire trouble, and excluding in any event loss or damage to any tire unless caused in an accidental collision which also causes other loss or damage to the insured automobile." Such a collision endorsement is known as full coverage. But it has certain exceptions. It excludes "loss or damage occurring while the automobile insured is in any race or speed contest or while being operated by any person under the age limit fixed by law or in any event under the age of sixteen years." Collision endorsements sometimes make an exception of losses due to upsets, and against loss or damage caused by collision with any part of the roadbed, or with the rails, or

ties of street, steam or electric railroads. But these restrictions generally have been eliminated. The collision endorsement also generally provides that the amount recoverable "shall not exceed the actual cash value of the property at the time of any loss or damage," but is not limited by the amount of insurance named in the policy to which the endorsement is attached.

§ 706. Definition.

The word "collision" has been variously defined by the lexicographers: "The act of striking together; as striking together, as of two hard bodies, a violent compact, as of railroad trains; a clashing."[1] "The act of colliding; condition of having collided; a striking together; violent compact, as of trains or steamships."[2] "The act of colliding or forcibly striking or dashing together; violent encounter of a moving body with another, in recent use especially of railway trains and ships."[3] "The act of striking two bodies violently together * * * It is the hitting and collision of them that must make them strike fire."[4] "The act of striking or dashing together of two bodies; the meeting and mutual striking or clashing of two or more moving bodies, or of a moving body with a stationary one; * * * the dashing together of two railroad trains or of two boats or ships."[5] "A policy insuring automobiles from damage from the 'collision' of such automobiles with other vehicles or objects means, by the word 'collision', cases of 'striking against' vehicles or objects not in motion."[6] The word is derived from the Latin "colliso," "collidere," meaning to dash together.

§ 707. Maritime insurance.

"Collision", said the court in a New York marine case,

1. Webster's Dict.
2. Funk & Wagnall's New Standard Dict.
3. Murray's Eng. Dict.
4. Encyclopedic Dict.
5. Century Dict.
6. Pope, Legal Definitions, vol. 1.

"in its strict nautical and legal acceptation, originally meant the impinging upon one another of vessels while being navigated, but in course of time and by common usage, the application of the term has been so far extended, in this country, at least, as to include the impact of vessel with other floating objects. * * * However, whether the term be treated by the courts as so fixed in character as to be restricted in its meaning to the coming together of two vessels, as is the rule in France, or so flexible as to include a variety of floating objects other than vessels, the idea of accident, so far as the insured is concerned, underlies it."[7]

The supreme court of the United States, speaking to the subject of collision in admiralty law, in a leading case said: "We think that the vessel was in 'collision' within the meaning of the language used in the certificate which represented and took the place of the policy. It was not necessary that the vessel should itself be in motion at the time of the collision. If while anchored in the harbor, a vessel is run into by another vessel, it would certainly be said that the two vessels had been in collision, although one was at anchor and the other was in motion. * * * It is impossible, as we think, to give a certain and definite meaning to the words 'in collision', or to so limit their meaning as to plainly describe in advance that which shall and that which shall not amount to a collision within the meaning of this policy."[8]

Two extreme maritime cases are interesting. Said the federal court in the first of these cases: "An injury received by a vessel from being violently rubbed by another or pressed by her with force against a pier or wharf, as in this case, may, I am inclined to think, be recovered for in admiralty under the general charge of collision, as well as

7. Newtown Creek Towing Co. v. Aetna Ins. Co., 163 N. Y. 114, 57 N. E. 302, rev'g 48 N. Y. S. 929, 23 App. Div. 152.

8. London Assur. Co. v. Companhia de Moagens Do Barreiro, 167 U. S. 149, 155, 42 L. Ed. 112, 119, 17 Sup. Ct. Rep. 785, 787.

where the injury is derived directly from the headway of a vessel under navigation or drifted against her."[9]

In the second case a flat boat was sunk at its wharf by violent waves produced by the steamship owned by the defendants. The court considered it a case of a collision, saying: "We shall consider this case as one of collision between the vessels; for it must be the same thing in principle, whether the steamboat ran upon the flat boat, or forced some other object upon it, to produce the injury."[10]

The word "collision" as used in marine insurance says the court in another federal case can no longer be limited to that fortuitously injurious contact of navigating vessels which is its obvious and national significance."[11]

§ 708. Rule of ejusdem generis—Exception.

THE TERM "OBJECT" AS USED IN THE AUTOMOBILE COLLISION POLICY INSURING AGAINST DAMAGE BY REASON OF COLLISION WITH ANY OTHER "AUTOMOBILE, VEHICLE OR OBJECT," IS NOT TO BE CONFINED TO OBJECTS SIMILAR TO AUTOMOBILE OR VEHICLE.

The use of the word "object" in an automobile collision insurance policy comes within the exceptions to the rule of *ejusdem generis* which is that the rule does not apply where the specific words embrace all objects of their class so that the general words must bear a different meaning from the specific words or be meaningless.[12]

The supreme court of the state of Wisconsin, in *Wettengel v. United States Lloyd's*, where the policy covered damage to the insured automobile "by being in collision during

9. The Moxey, Abb. Adm. 73, Fed. Cas. No. 9,894.

10. Wright v. Brown, 4 Ind. 95, 58 Am. Dec. 622.

11. Western Transit Co. v. Brown, (U. S. D. C.), 152 Fed. 476, aff'd 161 Fed. 869, 88 C. C. A. 617.

12. Bell v. American Ins. Co., 173 Wis. 533, 181 N. W. 733, 14 A. L. R. 179 (1921); New Jersey Ins. Co. v. Young, 290 Fed. 155 (1923), rev'g 284 Fed. 492; Rouse v. St. Paul F. & M. Ins. Co., 203 Mo. App. 603, 219 S. W. 688 (1920); Southern Casualty Co. v. Johnson, 24 Ariz. 221, 207 Pac. 987 (1922); St. Paul F. & M. Ins. Co. v. American Compound Co., 211 Ala. 593, 100 So. 904 (1924), 35 A. L. R. 1018; Wood v. Southern Casualty Co. (Tex. Civ. App.), 270 S. W. 1055 (1925); Garford Motor Truck Co. v. Miller's Nat. Ins. Co., 230 Ill. App. 622.

the period insured with any other automobile vehicle or object," excluding "damage caused by striking any portion of the roadbed or by striking the rails or ties of street, steam or electric railroads, laid down the rule that in order for the insured to recover under the policy there must have been, first, a collision; second, the collision must have been with another automobile, vehicle or similiar object, *ejusdem generis;* and, third, it must not have been with any portion of the roadbed." [13]

But later, in *Bell v. American Ins. Co.,* the Wisconsin court repudiated the rule of *ejusdem generis.*[14]

§ 709. Collision—What it imports.

THE TERM "COLLISION" IN AUTOMOBILE INSURANCE GENERALLY MEANS CONTACT WITH SOME OBJECT; IT IMPORTS A STRIKING TOGETHER OF THE AUTOMOBILE WITH ANOTHER OBJECT, WHILE ONE OF THE OBJECTS IS IN MOTION; BUT BOTH BODIES NEED NOT BE IN MOTION.

The term "collision", in recent years, has not infrequently received the consideration of the courts, but the courts are not in harmony in giving legal interpretation to the word.[15]

Generally speaking, the word as used in an automobile collision insurance policy, or as a rider thereto, means contact with some object;[16] it imports a striking together of the

13. Wettengel v. United States Lloyd's, 157 Wis. 433, 147 N. W. 360 (1914), Ann. Cas. 1915A, 626.

14. Bell v. American Ins. Co., 173 Wis. 533, 181 N. W. 733, 14 A. L. R. 179 (1921).

15. Cline v. Western Assur. Co., 101 Va. 496, 44 S. E. 700; Graham v. Insurance Co. of N. A., 220 Mass. 230, 107 N. E. 915; Hardenburgh v. Employers' Liability Assur. Corp., 80 Misc. 522, 141 N. Y. Supp. 502, rev. 78 Misc. 105, 138 N. Y. S. 662; Harris v. American Casualty Co., 83 N. J. L. 641, 85 Atl. 194, 44 L. R. A. (N. S.), 70, Ann. Cas. 1914B, 846; London Assur. Co. v. Companhia de Moagens, 167 U. S. 149, 42 L. Ed. 113, 17 Sup. Ct. Rep. 785; Newtown Creek Towing Co. v. Aetna Ins. Co., 163 N. Y. 114, 57 N. E. 302; O'Leary v. St. Paul F. & M. Ins. Co. (Tex. Civ. App.), 196 S. W. 575.

16. American Auto. Ins. Co. v. Baker (Tex. Civ. App.), 5 S. W. (2nd) 252.

automobile with another object, while one of the objects is in motion,[17] but both bodies need not be in motion.[18]

It is sufficient if either the automobile or the other object is in motion.[19]

§ 710. Impact with the ground.

IMPACT WITH THE GROUND BY AN AUTOMOBILE, WHETHER ON OR OFF THE HIGHWAY, DOES NOT AS A RULE CONSTITUTE COLLISION WITH AN OBJECT, WITHIN THE MEANING OF THE AUTOMOBILE COLLISION INSURANCE POLICY, AND IS NOT RECOVERABLE.

Automobile collision insurance cases generally hold, in effect, that impact with the ground alone, whether on or off the highway, by an automobile does not constitute collision with an object, within the meaning of the term as used in the collision policy, and is not recoverable.[20]

In the New York case of *Hardenburgh v. Employers' Liability Assurance Corporation,* the assured on meeting a team in the public highway was compelled to steer his automobile into the grass, and then down an incline below the level of the roadbed. While endeavoring to return, and proceeding up the shoulder of the road, one of the wheels collapsed and the machine overturned, before the car reached the roadbed. The policy indemnified "the assured against loss or damage to * * * the automobiles herein described * * * if caused solely by collision with another object, either moving or stationary excluding, however * * * all loss or damage caused by striking

17. Harris v. American Casualty Co., 83 N. J. L. 641, 85 Atl. 194, 44 L. R. A. (N. S.) 75 (1913), Ann. Cas. 1914B, 846.

18. Lepman v. Employers' Liability & Assur. Corp., 170 Ill. App. 379.

19. Bromberg v. Ft. Dearborn Casualty Underwriters, 231 Ill. App. 323 (1924); Kliant v. Prov. Assur. Co. Rap. Jud. Quebec, 63 C. S. 7 (1924); Lepman v. Employers' Liability Assur. Corp., 170 Ill. App. 379 (1912); Orr v. Farmers' Auto. Ins. Ass'n, 242 Ill. App. 135 (1926).

20. Alexander v. Home Ins. Co., 27 Haw. 326 (1923); Hardenburgh v. Employers' Liability Assur. Corp., 80 Misc. 522, 141 N. Y. S. 502, rev'g 78 Misc. 105, 138 N. Y. S. 662; New Jersey Ins. Co. v. Young (C. C. A. 9th Cir.), 290 Fed. 155 (1923); Moblad v. Western Indemnity Co., 53 Cal. App. 683, 200 Pac. 750 (1921); Royal Hawaiian Sales Co. v. Home Ins. Co., 27 Haw. 333 (1923).

any portion of the roadbed, or by striking street or steam railway rails or ties, and all loss or damage caused by the upset of the insured automobile, unless such upset is a direct result of such collision as is covered hereby." The lower court ruled that there was a sufficient collision between the shoulder of the roadbed and the wheel, within the meaning of the policy, to justify a verdict in favor of the plaintiff, but the decision was reversed on appeal on the ground that the burden rested upon the plaintiff to prove that the damage sustained was the result of a collision with some object, either moving or stationary, and that no evidence was given of the existence of any object with which the automobile did or could have come into collision.[21]

But it has been held in a recent case that contact of automobile with paved highway constituted "collision with another object, either moving or stationary" within the meaning of the policy.[22]

§ 711. Water and land.

WATER AND LAND ARE OBJECTS WITHIN THE MEANING OF THE TERM "COLLISION" AS USED IN AN AUTOMOBILE INSURANCE POLICY, AND AN AUTOMOBILE WHICH RUNS INTO EITHER WATER OR LAND COLLIDES WITH AN OBJECT.

Water and land are objects—physical objects. They are not abstract or imaginary, but tangible, visible, concrete, and real, and may be perceived and apprehended by the mind. The understanding has knowledge of them.[23]

An insured automobile which runs into either water or land collides with an "object" [24]

21. Hardenburgh v. Employers' Liability Assur. Corp., 80 Misc. 522, 141 N. Y. S. 502, rev. 78 Misc. 105, 138 N. Y. S. 662.

22. Hatton v. Indemnity Ins. Co. of North America, 93 Pa. Super. Ct. 310 (1929).

23. Harris v. American Casualty Co., 83 N. J. L. 641, 85 Atl. 194, 44 L. R. A. (N. S.) 75, Ann. Cas. 1914B, 846.

24. Columbia Ins. Co. v. Chatterjee, 93 Okla. 249, 219 Pac. 102; Southern Casualty Co. v. Johnson, 24 Ariz. 221, 207 Pac. 987 (1923); Fabregas v. Porto Rican & American Ins. Co., 31 Porto Rico Rep. 633 (1923); Fireman's Ins. Co. of Newark v. Savery (Ind. App.), 143 N. E. 612 (1924); Flynn v. General

But it does not follow that any and every contact between the insured automobile and water and/or land, regardless of the cause, which results in injury to the car constitutes a collision within the meaning of the term.[25]

§ 712. Approximate cause.

RULE HAS BEEN APPLIED IN CERTAIN CASES THAT IF THE APPROXIMATE CAUSE OF THE DAMAGE TO THE INSURED AUTOMOBILE WAS NOT COLLISION WITH AN OBJECT, THERE CAN BE NO RECOVERY.

The rule of approximate cause is that if the damage to the insured automobile is not directly attributable to collision with an object, within the terms of the policy, there is no right of recovery against the insurer. Although the rule of approximate cause possibly has not been enunciated particularly in cases of upsets and skidding, it undoubtedly may be applied to such cases.[26]

The leading case applying the rule involves the breaking of an axle.[27]

Acci. Fire & Life Ins. Corp., 9 La. 74 (1911); Harris v. Am. Casualty Co., 83 N. J. L. 641, 85 Atl. 194, 44 L. R. A. (N. S.) 75 (1912), Ann. Cas. 1914B, 846; St. Paul F. & M. Ins. Co. v. Am. Compounding Co., 211 Ala. 593, 100 So. 904 (1924); T. C. Power Motor Co. v. United States Fire Ins. Co., 69 Mont. 563, 223 Pac. 112 (1924); Tinker v. Boston Ins. Co., 106 Okla. 206, 233 Pac. 1058 (1925); Walter E. Heller & Co. v. International Indemnity Co., 238 Ill. App. 361 (1925); Wood v. Southern Casualty Co. (Tex. Civ. App.), 270 S. W. 1055 (1925).

25. Bell v. American Ins. Co., 173 Wis. 533, 181 N. W. 733 (1921), 14 A. L. R. 179; Moblad v. Western Indemnity Co., 53 Cal. App. 683, 200 Pac. 750 (1921); Ploe v. International Indemnity Co., 128 Wash. 480, 223 Pac. 327 (1924); Sutherland v. Hawaiian Ins. & Guaranty Co., Ltd., 29 Hawaii 101 (1926); Royal Hawaiian Sales Co. v. Home Ins. Co. of Hawaii, 27 Hawaii 333 (1923).

26. Brown v. Union Indemnity Co., 159 La. 641, 105 So. 918 (1925); Fox v. Interstate Exchange, 182 Wis. 28, 195 N. W. 842 (1923); Great Eastern Casualty Co. v. Solinsky, 150 Tenn. 206, 263 S. W. 71 (1925), 35 A. L. R. 1007; Moblad v. Western Indemnity Co., 53 Cal. App. 683, 200 Pac. 750 (1921); St. Paul Fire & Marine Ins. Co. v. American Compounding Co., 211 Ala. 593, 100 So. 904 (1924).

27. New Jersey Insurance Co. v. Young (C. C. A. 9th), 290 Fed. 155, rev'g Young v. New Jersey Insurance Co. (U. S. D. C. Mont.), 284 Fed. 492 (1923).

§ 713. Illustrations. (a) Breaking an axle.

In a case arising in the United States district court for the state of Montana, the policy insured against damage from accidental collision "with any other automobile, vehicle or object." The automobile while being driven on the highway was damaged by the breaking of the front axle and the dropping of the broken axle and the frame to the roadway, where they caught, causing the car to overturn and strike the ground with great force. The United States district court held that the facts showed a collision, entitling the insured to a recovery. This construction of the contract, however, was repudiated by the United States circuit court of appeals for the ninth circuit, which reversed the judgment of the district court.[28]

In discussing the question presented, the United States circuit court of appeals, in its opinion, says: "We are unable to construe the word 'collision' as including damage caused by the striking of the car upon the roadway after the defective axle broke and let the car down. The automobile was being driven upon the highway. It did not come in contact with any object upon the road or roadway until after the defective axle broke, when the car dropped and the end of the broken axle plowed into the roadway itself, and the car, pivoting on the broken axle, turned over and was damaged. In a usual sense, an accidental collision between an automobile and another object means striking against something on the road; for, instance, hitting a pedestrian, or a horse, or a cow perchance straying in the road, or a rock or stump upon the roadway, or a guard rail, such as is often placed in the road at points where repairs are being made, or where the automobile hits or rubs the side of a tunnel or embankment or bridge alongside or defining the road. In other words, we think the language of the contract, when accorded the ordinary and usual meaning that should govern, does not extend to the incident under consideration, where the approximate cause was the break-

28. Young v. N. J. Ins. Co. (U. S. D. C.), 284 Fed. 492 (1923).

ing of the defective axle, and damage was not by 'being in accidental collision' with an object."[29]

§ 714. Illustrations. (b) Striking a stump.

An automobile in rounding a curve on a mountain road, left the highway and got beyond the control of the driver. It proceeded about 25 feet from the road where it struck a stump which was approximately nine feet from the highway; the car then capsized and was demolished. The policy of insurance covered damage by being in "accidental collision with another automobile, vehicle or object." The damage must be the result of the collision. The court held that the insurance company was not liable in the case in question, for the proximate cause of the accident was not the contact of the automobile with the stump.[30]

The proximate cause of the accident was the skidding of the car, or its passage from the roadway from whatever cause, and that the moment it left the highway and started down the mountain side the car was doomed. Its destruction was imminent, whether it struck the stump or not. The fact that the automobile in descending down the hill repeatedly struck the earth did not constitute collision between the automobile and the earth within the meaning of the policy, even though the policy did not contain any exception for upsets.

But the Washington court distinguished this case from a later case affirming judgment of the lower court against the insurance company on the ground that there was a collision within the meaning of the policy insuring against loss or damage to the automobile "if caused solely by accidental collision with another object, either moving or stationary." Quoting from the court's opinion: "There was a curve in the highway, its degree not being shown; that on the right side of the pavement were situated some four or five posts, 6 to 8

29. New Jersey Ins. Co. v. Young (C. C. A. 9th), 290 Fed. 155.

30. Ploe v. International Indemnity Co., 128 Wash. 480, 223 Pac. 327 (1924), 35 A. L. R. 999.

inches in diameter, firmly planted in the ground 18 inches from the edge of the pavement, with a stringer or board connecting the posts near the top, on which were placed a number of mail boxes; that shortly after midnight on the morning in question these mail box posts were found torn out and scattered along, upon, and beside the pavement; that automobile tracks led from where the posts had been originally planted some 30 feet or more to a telephone pole which was only about 8 feet to the right of the pavement; that this post was scarred and abraded to a height of about 8 feet and left in an inclining position, being held from falling only by the wires attached to it; and at or near the foot of the pole was the wrecked car. It also appears that the paved highway was on a level with the foundation of the mail box posts and only slightly higher than the level of the ground from that point to the telephone pole, and one witness testified that the car could easily be driven off the pavement at that point without danger of upsetting unless driven at an excessive speed. From these known facts, might not the jury infer that the driver, in the night time, got slightly off the pavement to his right, that there would have been no danger to the car, had it not collided with the mail box posts, and that it did so collide, causing the driver to lose control, run into the telephone pole and destroy the automobile. It must be remembered that there is nothing in the policy vitiating the insurance if the driver be negligent, so that it is not necessary to inquire further as to why the car came in contact with the mail posts. Can it be said here, as in the Ploe case, that the car was doomed before it collided with the posts? We think every reasonable inference is to the contrary, and that the jury was justified in so finding. While we adhere to the doctrine of the Ploe case, we find it to be inapplicable here and the judgment is affirmed."[31]

31. Small v. Standard Acci. Ins. Co., 144 Wash. 523, 258 Pac. 33 (1927).

§ 715. Illustrations. (c) Striking a tree.

So, in a Hawaiian case, where the car accidently left the highway and rolled on its four wheels down a steep incline a distance of 136 feet and there struck some trees, the court held there was a "collision" with another "object" within the meaning of the indemnity policy. Quoting from the opinion of the court: "The injury to the car was the result of its collision, not with the trees that were growing on the side of the declivity or gulch * * *. It cannot be denied that a tree is an 'object' within the meaning of the insurance policy issued to the plaintiff. Neither can it be denied that if these 'objects' had been within the boundaries of the road along which the automobile was traveling * * * the defendant would be liable under the policy. But the defendant contends that a proper construction of its policy of insurance excludes all 'objects' except those within the road itself, and that it is not liable for damage caused by a collision with an object outside of the road. To so interpret the contract would be to write into it something to which the parties did not agree and which from the very terms of the contract it is evident was not within their contemplation. * * * The part of the above clause relating to 'objects' is very broad and expressly includes all objects, whether moving or stationary, and by implication includes all objects, whether on the road or outside of the road. If the insurance company had desired to limit its liability to collisions with objects within the road it should have said so in its policy." On the question as to what was the approximate cause of the accident, the court concluded that as the car left the highway purely as the result of an accident, it could not be said that the collision with the trees was not the direct cause of the damage to the car.[32]

The Hawaiian court had previously held where the driver of an insured automobile so quickly applied the brakes to avoid coming in contact with a horse that suddenly appeared in front of him on the highway, and the car upset on the sur-

32. Sutherland v. Hawaiian Ins. & G. Co., 29 Haw. 101 (1926).

face of the road, there was no collision within the meaning of a policy insuring against "accidental collision * * * with any other automobile, vehicle, or object."[33]

And the same court had also previously held that where the driver of an insured automobile so lost control of the car when a tire and rim came off one of the front wheels that the car went off the highway into an adjoining gulch, there could be no recovery against the insurer on the ground of "collision."[34] But the Hawaiian court distinguished these cases from the previous case.

§ 716. Roadbed.

CONTACT OF AUTOMOBILE WITH ROADBED, BY WEIGHT OF AUTHORITY, IS NOT A COLLISION.

Whether damage to an automobile by reason of coming in violent contact with the roadbed constitutes "collision" with an "object" within the meaning of a policy insuring against accidental collision * * * with any other * * * "object," is a question upon which there is some diversity of opinion.

The first case to determine the liability of the insurance company under the collision clause of an automobile policy by reason of the car being damaged as the result of contact with some part of the roadbed was undoubtedly the Pennsylvania case of *Dougherty v. Insurance Co. of North America*. The automobile was driven into a hole six or seven inches deep and eighteen inches wide, and extending the width of the street car track, on a well lighted street. The court held that there was not a "collision with an object" as was contemplated by the parties to the insurance policy containing the collision clause. Said the court: "The construction contended for by the plaintiff would include an ordinary rut in or the rounded elevations upon a country road, popularly termed 'thank-you-ma'am.' It would include the depression for drainage purposes, often found

33. Alexander v. Home Ins. Co., 27 Haw. 326 (1923).
34. Royal Hawaiian Sales Co. v. Home Ins. Co., 27 Haw. 333 (1923).

necessary in some roads, or if the machine ran off the side of a bridge into a stream of water. * * * To call this a 'collision with an object' is not, in our judgment, the plain, ordinary, and popular sense in which the word is used by those who drive automobiles, or in which we believe it was intended to be used by the contracting parties. If plaintiff's contention be sustained, his policy would practically cover any loss suffered by running over any obstruction in or upon a road or street; it surely would cover the case where an automobile would run over a dock and drop into the water, and accidents of like nature, none of which cases can, in our judgment, be said to be contemplated by the policy before the court." [35]

In an Illinois case, the front wheel of a truck struck the forward side of a ten inch hole in a roadway. The steering wheel was wrested from the control of the driver, and the driver having lost control, the truck left the highway and slid off an embankment into a lake. The policy did not contain the clause "excluding * * * damage caused by striking any portion of the roadbed," and the question presented by the wording of the policy was whether the truck was damaged "by being in accidental collision" with "any other automobile, vehicle, or object?" Quoting from the opinion of the court: "There are several fundamental rules which should be kept in mind in determining that question. The provisions of a policy of insurance should be construed liberally, so as not to defeat, without a plain necessity, the claim of the assured to the indemnity, which was the whole object of the contract to secure him. Where the words of a policy of insurance are ambiguous, or where, without doing them violence, they are capable of two interpretations, that one should be adopted which will sustain the claim of the assured. In determining the meaning of the words used in such a contract, and deciding whether they are ambiguous or capable of more than one reasonable

35. Dougherty v. Ins. Co. of N. A., 19 Pa. Dist. 547, 38 Pa. Co. Ct. 119 (1911).

interpretation, the words should be taken in the plain and ordinary sense in which they are generally used and understood with regard to or in connection with the subject-matter involved, and they should not be given a strained or violent interpretation. In our opinion it may not reasonably be said that, in going into the depression of a hole, described by the witnesses, the violent jerk of the wheels as the truck reached the far side of the hole, causing the steering wheel to get out of control of the driver, the truck was 'in accidental collision with an 'object.'' To make the words used in the policy cover such a state of facts is, in our opinion, to do them violence. It seems perfectly clear when one reads the words as they appear in the paragraph of the policy in question, taking them in their plain and ordinary sense, and the sense in which any reasonable person would understand them, that there can be no doubt as to their meaning, and that they were not intended or expected to cover such an occurrence as the one involved here, or, in other words, it may not reasonably be said that the hole in the pavement, or the far side of the hole, was an 'object' within the meaning of that word as we find it in the insurance policy involved in this case. As far as the evidence shows, in passing through this hole the wheels of the truck came into contact with nothing but the roadway. In our opinion, when a truck or other vehicle wheel comes in contact with some uneven or irregular part of the road, whether it be an elevation or depression, resulting in the vehicle being thrown off the road, it does violence to the ordinary reasonable meaning of the words to say that it has been in accidental collision with an 'object,' namely, the uneven spot in the road. There may not be said to be a 'collision' (within the meaning of that word as used in such a clause in an insurance policy as the one before us) between two objects which are already in contact with one another, as the wheel of this truck was with the roadway until after it had passed through this hole. * * * We are not unmindful of the fact that many automobile accident

insurance policies contain a provision which is similar to the one involved here, with a phrase added, 'excluding * * * damage caused by striking any portion of the roadbed,' as in several of the cases to which we have referred. But even where the language of the policy does not contain that clause, as in the case at bar, we are of the opinion that where damage is caused to an automobile by reason of one or more of its wheels passing over a rough spot in the road, whether that spot be a depression or an elevation, there may not be said to have been a collision between such automobile and another object so as to bring the occurrence within the terms of such provision in a policy of insurance as is involved here.'' [36]

§ 717. Roadbed. Exclusion clause.

In many cases the collision policy has contained a clause excluding the company from liability in which injuries are caused by striking any portion of the roadbed, etc.[37]

§ 718. Contact with embankment, ditch or ledge—Distinguished from roadbed.

THE COURTS GENERALLY HOLD THAT WHERE THE INSURED AUTOMOBILE IS INJURED BY COMING IN CONTACT WITH EMBANKMENT, DITCH OR LEDGE, THERE IS A COLLISION WITHIN THE MEANING OF THE TERM AS USED IN AN AUTOMOBILE COLLISION INSURANCE POLICY.

The courts have distinguished between cases involving damage to the insured automobile by coming in contact with the roadbed from those arising by reason of contact with an embankment, ditch or ledge. While there is no

36. Garford Motor Truck Co. v. Miller's Nat. Ins. Co., 230 Ill App. 622.

37. Stuht v. U. S. F. & G. Co., 89 Wash. 93, 154 Pac. 137; Harris v. American Casualty Co., 83 N. J. L. 641, 44 L. R. A. (N. S.) 70, 85 Atl. 194, Ann. Cas. 1914B, 846; Rouse v. St. Paul F. & M. Ins. Co., 203 Mo. App. 603, 219 S. W. 688; Hanvey v. Georgia L. Ins. Co., 141 Ga. 289, 81 S. E. 206; Hoosier Mut. Auto. Ins. Co. v. Lanam, 79 Ind. App. 629, 137 N. E. 626; Gibson v. Georgia L. Ins. Co., 17 Ga. App. 43, 86 S. E. 335, 14 A. L. R. 191; Hardenburgh v. Employers' Liability Assur. Corp., 80 Misc. 522, 141 N. Y. S. 502, rev'g 78 Misc. 105, 138 N. Y. S. 662.

right of recovery for injuries sustained to the insured automobile from contact with the roadbed, the courts have generally held that the assured can recover for damages to the insured car resulting from contact with embankment,[38] ditch,[39] or ledge.[40] Such injuries are the result of a collision within the meaning of the term as used in the automobile insurance policy.

§ 719. Contact with embankment, ditch or ledge. (a) Embankment.

The Illinois court has distinguished a case where the damage was caused by an automobile going over an embankment and striking the side or bottom of a ditch[41] from that where a front wheel of a truck struck the side of a hole in the roadway.[42] In the case of *Bromberg v. Ft. Dearborn Casualty Underwriters,* the driver was attempting to turn the car around on a slippery pavement. The hind wheels backed over an embankment; the brakes did not hold; the car backed down the incline against a water main, and was then thrown into a deep hole. Said the court: "There can be no doubt that the water main was a stationary object, and the provision of the policy above

38. Interstate Casualty Co. v. Stewart, 208 Ala. 377, 94 So. 345 (1922); Hanvey v. Georgia Life Ins. Co., 141 Ga. 289, 81 S. E. 206 (1914); Pred v. Employers' Indemnity Corp., 112 Neb. 161, 198 N. W. 864 (1924); Columbia Ins. Co. v. Chatterjee, 93 Okla. 249, 219 Pac. 102 (1923); Rouse v. St. Paul Fire & Marine Ins. Co., 203 Mo. App. 603, 219 S. W. 688 (1920).

39. St. Paul Fire & Marine Ins. Co. v. American Compounding Co., 211 Ala. 593, 100 So. 904 (1924), overruling Continental Casualty Co. v. Paul, 209 Ala. 166, 95 So. 814 (1923); Walter E. Heller & Co. v. International Indemnity Co., 238 Ill. App. 361 (1925); Firemen's Ins. Co. of Newark v. Savery (Ind. App.), 143 N. E. 612 (1924); T. C. Power Motor Car Co. v. U. S. Fire Ins. Co., 69 Mont. 563, 223 Pac. 112; Tinker v. Boston Ins. Co. of America, 106 Okla. 206, 233 Pac. 1058 (1925); Wood v. Southern Casualty Co. (Tex. Civ. App.), 270 S. W. 1055 (1925).

40. Schussler v. Ft. Dearborn Casualty Underwriters, 230 Ill. App. 581 (1923).

41. Bromberg v. Ft. Dearborn Casualty Underwriters, 231 Ill. App. 323 (1924).

42. Garford Motor Truck Co. v. Miller's Nat. Ins. Co., 230 Ill. App. 622 (1923).

referred to manifestly contemplates collision with or against such an object. While the definition of the word 'collision' includes a 'mutual striking or dashing of a moving body with a stationary one,' yet the decisions have not been uniform in the application of the term * * *. Many of the cases, however, recognize the general rule that insurance contracts should be construed most strongly against the insurer. * * * But we find no difficulty in applying the definition above stated to the facts in the case. * * * In fact, in this policy the policy contemplates that one may be stationary, which is in conformity with definitions in our standard dictionaries. * * * The sides and bottom of the ditch were objects, as much so as an automobile or any other physical thing. * * * The case of *Garford Motor Truck Co.* involved a very different set of facts. There it was a question whether there was a collision within the policy, where front wheel of a truck struck the forward side of a ten inch hole in the roadway; and this court held that the meaning of the word, as used, was too limited to cover such an impact. But it does not follow that the limitation of the connotation of the word in that case means that even where the collision takes place off the roadway, as here, the words of the policy are inapplicable. The *Garford Case* means that continuity of contact of the wheels of a motor vehicle with the roadway cannot, in and of itself, constitute a collision, within the meaning of the usual words of accident policies * * *. In the instant case, as we have said, the damage was caused by the plaintiff's automobile striking the side or bottom of the ditch, which was, of course, not part of the roadbed."[43]

When an automobile covered by a policy of insurance indemnifying against damage caused solely by being in "collision with any other automobile, vehicle, or other object, either moving or stationary," is running at an ordinary or necessary rate of speed, and for any cause leaves the

43. Bromberg v. Ft. Dearborn Casualty Underwriters, 231 Ill. App. 323 (1924).

road, striking an embankment of earth outside of the roadway with such force as to demolish the wheels of the car, or to upset the car and otherwise damaging or demolishing it, there is a collision within the terms and meaning of the contract of insurance.[44]

In an Alabama case, at the time of the accident the plaintiff was driving the insured car over a hill, and when he came to the top thereof something went wrong with his steering gear; he lost control of the car, which started downhill and ran into and up an embankment outside of the road. The car struck the embankment almost at right angles, with both front wheels, breaking and crushing one wheel, and turned over. The embankment was about ten feet from the road. The court held there was a "collision" within the terms and meaning of the policy.[45]

In a Georgia case, on a policy insuring against loss or damage "caused solely by collision with another object either moving or stationary * * * excluding, however, * * * all loss or damage caused by striking any portion of the roadbed, the complaint on general demurrer was held to set forth facts sufficient to constitute a cause of action where it alleged that the automobile left the roadbed and ran into the ditch on the side of the road and into the bank on the further side of the ditch. The court held the averment that the automobile left the roadbed placed the cause of the damage outside of the exclusion provision of the policy.[46]

In an Arizona case, the car collided with an embankment, causing it to tip over. The policy rendered the insurance company liable for damage to the automobile "by being in an accidental collision * * * with any other

44. Harris v. American Casualty Co., 83 N. J. L. 641, 85 Atl. 194, 44 L. R. A. (N. S.) 70, Ann. Cas. 1914B, 846; Universal Service Co. v. American Ins. Co., 213 Mich. 523, 181 N. W. 1007, 14 A. L. R. 183; Interstate Casualty Co. v. Stewart, 208 Ala. 377, 94 So. 345, 26 A. L. R. 427.

45. Interstate Casualty Company v. Stewart, 208 Ala. 377, 94 So. 345, 26 A. L. R. 427.

46. Hanvey v. Georgia Life Ins. Co., 141 Ga. 389, 81 S. E. 206 (1914).

* * * objects." The court held the insurance company liable, but distinguished the case from an upset or tipover caused by a car being run upon or over an inclined embankment. The court said: "However, an upset or tipover resulting in damage may itself be caused by a collision, and, where this is true, the insurer is just as liable under an 'accidental collision policy' as though the injury to the car is as much due to the collision, though indirectly, as if the upset had not occurred * * *. As used in this policy, the word 'collision' has its usual meaning of 'striking together, or striking against,' and includes the case of an automobile striking against any other object, whether that object be standing or in motion, or whether it be another automobile, vehicle or some similar object, or something altogether different; because the rule of *ejusdem generis* does not apply, but rather the exception to it, which gives general words following particular words including all of their class a meaning different from that of the specific words."[47]

So it was held in a New York case, where insured was driving along a narrow country road, and in order to avoid striking an automobile approaching from the opposite direction, he swerved to the outer edge of the roadway and his car left the road. The court held that the accident came within the definition of "collision" as used in the policy, and the company was liable.[48]

In the Alabama case of *St. Paul Fire & Marine Ins. Co. v. American Compounding Co.*, the insured automobile was left overnight on the crest of a hill. The hind wheels were on level ground, and the front wheels were on ground that was sloping. While the car was being swept out, it started down the hill, ran off a precipice and struck the rock bottom of an excavation. The court held that there was a "collision with an object" within the meaning of the "accidental colli-

47. Southern Casualty Co. v. Johnson, 24 Ariz. 221, 207 Pac. 987 (1922).

48. Polstein v. Pacific Fire Ins. Co., 122 Misc. Rep. 194, 203 N. Y. S. 362 (1924).

sion" clause of the policy.[49] This case really overruled the previous Alabama case of *Continental Casualty Co. v. Paul,* wherein it was held if the car fell from its own momentum, without the application of exterior force, it was not a "collision with any moving or stationary object."[50] It was held in a Missouri case where the insured automobile skidded off the road and collided with the earth at the bottom of an embankment that the exception in the policy as to the road-bed did not apply, and the insurer was liable.[51]

§ 720. Contact with embankment, ditch or ledge. (b) Ditch.

Where the collision policy does not limit the collision to one on the highway or restricts the kind of object, there is a "collision" within the meaning of the policy when the automobile comes in contact with the "body and banks of a ditch" extending across the highway, and with such force that the car is demolished.[52] The policy also includes collision or contact with the bottom of a ditch, where the car skids and is damaged when being driven at a reasonable rate of speed.[53]

§ 721. Contact with embankment, ditch or ledge. (c) Ledge.

The Illinois court has also held that when an automobile while being driven strikes a ledge which is alongside of the roadway, though not in the beaten path, there is a collision. The ledge was twelve inches above the surface, and was actually collided with. Said the court: "Inasmuch, therefore, as the uncontroverted evidence shows that the automobile struck a ledge twelve inches high, and by reason thereof

49. St. Paul Fire & Marine Ins. Co. v. American Compounding Co., 211 Ala. 593, 100 So. 904, 35 A. L. R. 1018.

50. Continental Casualty Co. v. Paul, 209 Ala. 166, 95 So. 814 (1923), 30 A. L. R. 802.

51. Rouse v. St. Paul F. & M. Ins. Co., 203 Mo. App. Rep. 603, 219 S. W. 688 (1920).

52. T. C. Power Motor Car Co. v. U. S. Fire Ins. Co., 69 Mont. 563, 223 Pac. 112 (1924).

53. Fireman's Ins. Co. of Newark v. Savery (Ind. App.), 143 N. E. 612 (1924).

was injured and damaged, it is our judgment that that constituted such collision as was contemplated by the parties when they entered into the insurance contract in question.''[54]

§ 722. Rut.

Where the insured had complete coverage form of collision automobile insurance, and the insured car ran into rut on the highway, skidded into ditch and overturned, rut is an ''object'' within the terms of the policy, and the sides and bottom of the ditch are as well, and the insurer is liable.[55]

But in a Canadian case where the policy provided for indemnity for damage to the insured automobile in an ''accidental * * * collision with any other automobile, vehicle or object,'' and the car struck a rut, upset and went into a ditch, the court held that this was not a collision within the meaning of the policy.[56]

§ 723. Washout.

There is an ''accidental collision'' within the meaning of an automobile collision insurance policy where the automobile is precipitated over chasm in the highway caused by washout, and the car is damaged by coming in contact with the bottom of the chasm.[57]

§ 724. Shoulder of pavement.

Contact with the concrete shoulder of a highway pavement resulting in damage to the insured automobile is collision with an object within the meaning of the collision insurance policy, as has been held in the state of Illinois. Under the facts of the case in question the car had left the

54. Schussler v. Ft. Dearborn Casualty Underwriters, 230 Ill. App. 581 (1923).

55. Wood v. Southern Casualty Co. (Tex Civ. App.), 270 S. W. 1055 (1925).

56. London Guaranty & Acci. Co. v. Sowards (S. C. Can.), 2 D. L. R. 495, S. C. R. 365 (1923).

57. Tinker v. Boston Ins. Co., 106 Okla. 206, 233 Pac. 1058 (1925).

edge of the highway to prevent colliding with another car, and on turning back struck the concrete shoulder of the pavement. The steering gear of the car was broken; the car then became unmanageable, and upset.[58]

§ 725. Curbing.

In a Georgia case, the automobile collision policy insured against loss or damage "caused solely by collision with another object, either moving or stationary," but "excluding * * * all loss or damage caused by striking any portion of the roadbed or any impediment consequent upon the condition thereof." The court held that where the car was damaged by colliding with the curbing of a street, there could be no recovery, for the curbstone of a street is a "portion of the roadbed" and is an "impediment consequent upon the condition thereof."[59]

§ 726. Upsets.

AN UPSET, IT IS GENERALLY HELD, IS NOT A COLLISION WITHIN THE MEANING OF THE WORD AS USED IN AN AUTOMOBILE COLLISION POLICY.

It is generally held that there can be no recovery on a collision policy for damages resulting to an insured automobile when the approximate cause of the accident is an upset.[60]

The question presented in a Louisiana case was whether recovery could be had on an automobile collision policy insuring against loss by reason of damage to, or destruction thereof "caused solely by accidental collision with another object," where the insured's automobile was damaged by tipping over and coming into violent contact with the surface of the road.

58. Orr v. Farmers' Auto. Ins. Ass'n, 242 Ill. App. 135 (1926).

59. Gibson v. Georgia Life Ins. Co., 17 Ga. App. 43, 86 S. E. 335 (1915).

60. Stuht v. U. S. F. & G. Co., 89 Wash. 93, 154 Pac. 137 (1916); Bell v. American Ins. Co., 173 Wis. 533, 181 N. W. 733 (1921), 14 A. L. R. 179; Brown v. Union Indemnity Co., 159 La. 641, 105 So. 918, 54 A. L. R. 1439; Alexander v. Home Ins. Co., 27 Haw. 326 (1923).

Plaintiff's automobile was being driven in a westerly direction. Another automobile was immediately in front of his car, traveling in the same direction and on the same side of the road. Both machines were proceeding at the rate of twenty-five miles an hour. The first car slowed down, and the driver of plaintiff's automobile turned toward its left and speeded up in an attempt to pass the car. When plaintiff's car was about to pass the other car, the driver of this car also speeded up and turned to the left for the purpose of avoiding another automobile which was rapidly approaching from the opposite direction. The driver of this car, in attempting to pass the other cars, turned to the left side of the road, which was the wrong side for it to be on. In order not to collide with the second named car, the plaintiff's driver turned his car sharply to the right of the road, avoiding the other cars. In so doing, plaintiff's automobile tipped over and came into violent contact with the surface of the road, breaking the body of the car and otherwise badly damaging it. After reviewing many cases, the court said: "It is our conclusion, after careful consideration of the question presented and review of the authorities enumerated, that defendant company is not liable on the policy used herein. To hold otherwise would be to give the language of the policy a strained and unnatural construction, and one that, in our judgment, was not contemplated by the parties. The so-called collision alleged by plaintiff was the contact of the automobile with the roadway caused by the upsetting or tipping over of the car. Now it is a matter of common understanding that an automobile, to be of any practical value and utility, must travel on streets and roads. In order to do so, it is necessarily, at all times, in contact with the surface of the street or roadway. If the car upsets or tips over, the effect is merely to transfer the point of contact from its wheels to its side, or to that portion of the machine that rests upon the roadway. We do not think that such circumstances can be said to be a collision in popu-

lar understanding of the word and within the meaning of the policy.'' [61]

In a California case, the automobile of the insured was being driven along the highway, and, in order to avoid striking another vehicle, the driver swerved to the outer edge of the roadway, which gave way, and caused the automobile to overturn and roll down an embankment. The policy provided that the insured should be indemnified for damages caused ''soley by collision with another object.'' The court held that the proximate cause of the accident was the overturning of the car on the edge of the road, and that the cause of the accident was not a collision, but the upsetting of the automobile.[62]

§ 727 Upsets. (a) Quick application of brakes.

''Collision'' within the meaning of a clause insuring the automobile against loss or damage caused by ''accidental collision * * * with any other automobile, vehicle or object'' does not take place and the insurer is not liable under such a policy where the brakes of the car are suddenly applied and the car upsets on the roadway. Even though the brakes of the car were quickly applied to avoid running into a horse which has suddenly appeared on the highway in front of the car does not change the rule in the case. The court has said in such a case: ''Measured by a precise literal application of either of the definitions quoted to the facts involved it might be said from a lexicographical standpoint that, when the automobile overturned and came in contact with the side of the road, the automobile came in 'collision' with the side of the road. But the generally accepted meaning of the word 'collision,' and not the technical lexicographical definition, controls. A policy of insurance is a contract. While in case of doubt or ambiguity its terms must be construed strictly against the insurer in construing

61. Brown v. Union Indemnity Co., 159 La. 641, 105 So. 918, 54 A. L. R. 1439.
62. Moblad v. Western Indemnity Co., 53 Cal. App. 683, 200 Pac. 750 (1921).

the meaning of words employed therein, such words, similarly as in the case of ordinary contracts, should be given their ordinary and popularly accepted meaning, in the absence of anything to show that they were used in a different sense. One describing the accident in the instant case would not refer to it as a 'collision.' The term 'capsize' or 'tip over' as employed in the submission would be more reasonably descriptive of the accident. * * * Upon reason and authority we believe that the term 'collision' as employed in the policy in the instant case was used in its ordinary and popularly accepted meaning."[63]

§ 728. Upsets. (b) Car settling in soft ground.

In a Wisconsin case, the driver of an automobile was endeavoring to turn his car, and, while doing so, backed it upon soft ground, where it gradually settled, tipped over, and struck the ground, doing considerable damage. The collision policy covering the car provided against damage "by being in an accidental collision, during the period insured, with any other automobile, vehicle or object." In its opinion, the court used the following language: "While it is true that insurance contracts should be construed most strongly against the insurer, * * * yet they are subject to the same rules of construction applied to the language of any other contract. It is a fundamental rule that the language of a contract is to be accorded its popular and usual significance. It is not permissible to impute an unusual meaning to language used in a contract of insurance any more than to the language of any other contract. The incident causing the damage to the automobile here in question is spoken of in common parlance as an upset or tipover. If it were the purpose to insure against damage resulting from such an incident, why should not such words, or words of similar import, have been used. We cannot presume that the parties to the contract intended that an upset should be

63. Alexander v. Home Ins. Co., 27 Haw. 326 (1923).

construed as a collision in the absence of a closer association of the two incidents in popular understanding."[64]

§ 729. Upsets. (c) Short turn while driving rapidly.

In a Washington case, the policy also insured against damage "if caused soley by collision with another object, either moving or stationary", but excluded, however, "all loss or damage caused by striking any portion of the roadbed," and "all loss or damage caused by the upset of the injured automobile unless such upset is a direct result of such a collision as is covered" by the policy. The car was being driven down a hill at a rapid rate of speed, when the driver attempted to make a short turn. On the brink of the hill the car upset and went down the hill. The court held that there was no collision within the terms of the policy, and that the facts of the case placed it within the exception.[65]

But it has been held in an Ohio case where the policy insured against "accidental collision with another object, either moving or stationary" and did not exclude liability for damages resulting from contact with the roadbed, that the insurer could recover for injuries to the insured car by reason of it tipping over on its side while being driven around a sharp curve at a rapid rate of speed.[66]

§ 730. Contact with bridge.

In a New Jersey case, the plaintiff was the owner of an automobile which was being driven by his chauffeur over a bridge. The sides of the bridge were protected by guard rails made of posts and planking. The car crashed through the rail on one side, and was precipitated into the stream below. The machine turned upside down after leaving the bridge, and rested in an inverted position on the bed of the stream. The policy insured for damages sustained "from

64. Bell v. American Ins. Co., 173 Wis. 533, 181 N. W. 733 (1921), 14 A. L. R. 179.

65. Stuht v. U. S. F. & G. Co., 89 Wash. 93, 154 Pac. 137 (1916).

66. Great American Mutual Indemnity Co. v. Jones, 111 Ohio St. 84, 144 N. E. 596 (1924), 35 A. L. R. 1023.

collision with any moving or stationary object" excluding, however, "damage resulting from collision due wholly or in part to upsets." But the ruling of the court was that the evidence did not place the case within the exception and that the insurance company was liable. The reasoning of the court was this: "It cannot be said that the collision of the plaintiff's automobile with the water and land under the water was caused by an upset. It may be that the car upset by reason of contact with the water or the earth, but the collision was not due to an upset; the upset may have been the result of the collision. The provision of the policy cannot mean that, where collision has first taken place, there can be no recovery because, as the result of the collision the machine is upset." The insurance company also contended that there was no liability on the policy because the moving water and stationary earth beneath, with which the machine came in contact, were not moving and stationary objects contemplated in the policy. But the court said: "Both bodies need not be in motion; but, if both had to be in order that there be a collision ordinarily, it would not be so in this case, for by the very terms of the policy sued on, the plaintiff is entitled to recover solely from collision with any moving or stationary object. Therefore, he is entitled to damages unless, within the meaning of the policy, the moving or stationary object must be perpendicular, instead of horizontal. There are no words in the policy which limit the meaning of the object to a perpendicular one * * * When the car ran off the bridge, dynamic force and gravitation determined the position in which it would strike first the water and then the bed of the stream. Its final position was merely incidental to the collision." [67]

§ 731. Skidding.

WHERE THE APPROXIMATE CAUSE OF THE INJURY TO THE INSURED AUTOMOBILE IS SKIDDING, THE COURTS GENERALLY HOLD THERE IS NO RIGHT OF RECOVERY UNDER THE COLLISION POLICY.

67. Harris v. American Casualty Co., 83 N. J. L. 641, 85 Atl. 194, 44 L. R. A. (N. S.) 70, 76 Ann. Cas. 1914B, 846 (1912).

Skidding of the automobile oftentimes results in an upset, and the rule applied by the courts is generally the same, to wit, that the insured has no right of recovery when the approximate cause of the damage to the car is the result of skidding. It does not seem to make any particular difference as to what the reason for the skidding of the car may have been, the rule seems to apply.[68]

Even though the assured is attempting to avoid collision with another car, he cannot recover for damages directly resulting from the skidding of his car.[69]

Where the automobile collision insurance policy excepts liability of the insurer for contact with the roadbed "or the side thereof," the insurance company is not liable for damage to the car when the insured, in an effort to avoid running into another car, swerved the car sharply causing the rear end to skid off the highway pavement and strike the soft ground of a field with sufficient force to crush the rear wheel and cause the car to overturn.[70]

In a Tennessee case, the driver of the insured car suddenly applied the brakes in responding to what he thought was a signal light to stop at a railroad crossing. Upon the application of the brakes the car skidded, swerving and reversing its position, its right wheel collapsed, and it was precipitated on its right side upon the roadbed. The policy insured the automobile against damage or destruction "if caused solely by collision with another object either movable or stationary." The court held that there was no collision

68. Graham v. Insurance Co. of N. A., 220 Mass. 230, 107 N. E. 915 (1915); Hoosier Mutual Auto. Ins. Co. v. Lanam, 79 Ind. App. 629, 137 N. E. 626 (1923); Great Eastern Casualty Co. v. Solinsky, 150 Tenn. 206, 263 S. W. 71, 35 A. L. R. 1007 (1924); Fox v. Interstate Exchange, 182 Wis. 28, 195 N. W. 842 (1923).

69. Hoosier Mutual Auto. Ins. Co. v. Lanam, 79 Ind. App. 629, 137 N. E. 626 (1923).

70. Hoosier Mutual Auto. Ins. Co. v. Lanam, 79 Ind. App. 629, 137 N. E. 626 (1923).

within the meaning of the policy, for there was nothing in the road except a little loose gravel.[71]

Likewise, it was held in a Massachusetts case that the skidding of the hind wheels of a truck into a gutter upon a public highway, causing the truck to tip and capsize, was neither a "collision" nor a "derailment" within the meaning of a policy insuring certain goods against loss or damage by collision which were being transported by the truck.[72]

The complaint, in a Wisconsin case, alleged that while the insured was driving his automobile on a recently graveled highway, the car skidded, violently struck the highway embankment on the other side of the road and was overturned and damaged. It was insufficient as against a general demurrer. The court ruled that the striking of the automobile against an embankment, as alleged in the complaint, did not constitute a "collision" within the meaning of the policy.[73]

But in a Missouri case where the policy insured against loss "caused solely by collision with another object (excluding, however, * * * all loss or damage caused by striking any portion of the roadbed)", the insured automobile on being driven down a roadway skidded so that the rear wheels were thrust across the granitoid guttering next adjacent to the roadway and across a grass plot two feet wide between the guttering and the sidewalk where the rear wheel collided with the sidewalk. The sidwalk was about six inches higher than the surface of the earth. The court, in part, said: "Here the policy does not exclude loss or damage caused by striking any portion of the roadway or street, but rather confines the exemption of liability to the more restricted area of the 'roadbed'.

"In common roads the term 'roadbed' refers to the whole field material laid in place and ready for travel. Obviously the roadbed involved here consisted of the portion between

71. Great Eastern Casualty Co. v. Solinsky, 150 Tenn. 206, 263 S. W. 71, 35 A. L. R. 1007 (1924).

72. Graham v. Insurance Co. of N. A., 220 Mass. 230, 107 N. E. 915 (1915).

73. Fox v. Interstate Exchange, 182 Wis. 28, 195 N. W. 842 (1923).

the gutters on either side which was constructed for travel, and not to the gutters designed for the purpose of draining water from the adjacent roadbed." The court held that the guttering was no part of the roadbed within the meaning of the policy, and that the lower court did not err in so instructing the jury.[74]

§ 732. Fall of scoop upon truck.

THE RULE IS THAT WHERE THERE IS A STRIKING TOGETHER, A VIOLENT CONTACT OR MEETING OF TWO BODIES, THERE IS A COLLISION BETWEEN THEM, AND THE ANGLE FROM WHICH THE IMPACT OCCURS IS UNIMPORTANT.

Does the fact that the truck was struck by an object coming from above it, instead of on a level with it, remove the accident from the field of "collision" and relieve the insurance company from liability? This was the interesting question decided in a Michigan case.[75] Plaintiff corporation was in the business of selling trucks on installment contracts. It entered into a contract with defendant insurance company, insuring it, among other things, from loss and damage occasioned by collision. The case was submitted on an agreed statement of facts from which it appeared that there was "full coverage collision" insurance.

Plaintiff corporation had sold to plaintiff partnership a truck on installment, and had an insurable interest in it. The truck was loaded by means of a steam shovel. The scoop was filled with crushed stone, lifted by the derrick, swung over the truck, lowered to the proper position, and opened to allow the stone to fall into the truck body. At the time of the accident, the loaded scoop, while over and above the truck, fell for some unexplained reason upon the truck, caused the damage for which the suit was instituted on the collision clause of the insurance policy. The court, in part, said: "Most collisions occur in the violent impact of two

74. Stix v. Travelers' Ind. Co. of Hartford, 175 Mo. App. 171, 157 S. W. 870 (1913).

75. Universal Service Co. v. American Ins. Co. of Newark, N. J., 213 Mich. 523, 181 N. W. 1007 (1921), 14 A. L. R. 183.

bodies on the same plane or level, and it is undoubtedly true that the word is more frequently used to express such impacts than other violent impacts. But we doubt that this fact has given to the word such a common understanding of its meaning as to exclude violent impact unless upon the same plane or level. If one machine was going up and another going down a steep hill, and they came violently together, no one would hesitate for a moment in using the word 'collision'. At what angle must the impact occur to make the use of the word 'collision' inappropriate and relieve the insurance company from liability? We are persuaded that the better rule, the safe rule, is to treat and consider the word as having the meaning given it uniformly by the lexicographers; that where there is a striking together, a violent contact or meeting of two bodies, there is a collision between them, and that the angle from which the impact occurs is unimportant. In the instant case there was the violent striking together of the truck and the heavily ladened scoop; this was a collision within the meaning of the policy and rendered the defendant liable.'"[76]

But there are jurisdictions where this rule undoubtedly would be seriously questioned.[77]

§ 733. Falling down elevator shaft.

In a Pennsylvania case, the insured automobile was backed into an elevator shaft inside a building, and fell to the bottom of the shaft. The policy undertook to "cover damages to the automobile and equipment herein insured caused by collision with any other vehicle, or with any animal or object, or any obstacle placed as a barrier, or in entering or leaving any building adjacent to any roadway," and contained a clause excluding the company from liability caused by striking any portion of the roadbed, street

76. Universal Service Co. v. American Ins. Co. of Newark, N. J., 213 Mich. 523, 181 N. W. 1007, (1921), 14 A.L. R. 183.

77. Bell v. American Ins. Co., 173 Wis. 533, 181 N. W. 733 (1921), 14 A. L. R. 179; O'Leary v. St. Paul F. & M. Ins. Co. (Tex. Civ. App.), 196 S. W. 575 (1917).

or steam railroad rails, etc. Recovery was had even though the "collision" took place inside the building.[78]

It was also held in a New York case that where the policy indemnified the insured for damages "caused solely by accidental collision with another object whether moving or stationary" that the insurer was liable for damages sustained to the automobile by reason of the fall of the elevator in which it was being lowered.[79]

§ 734. Collapse of building.

A rather anomalous case arose in the state of Texas. While the insured automobile was being repaired in a garage the building collapsed, and falling flooring damaged the car. The policy insured against damage by being in collision with any other automobile, vehicle, or object, and excluded damage caused by striking the rails or ties of a street, steam, or electric railroad. The court held that the damage resulting from such an accident did not come within the meaning of collision as contemplated by the parties in the insurance contract.[80]

§ 735. Driving in violation of law.

WHERE THE POLICY EXCEPTS THE INSURER FROM LIABILITY WHILE INSURED IS "DRIVING IN VIOLATION OF LAW OR CONTRARY TO THE RULES OF THE ROAD," THE ASSURED HAS NO RIGHT OF RECOVERY, UNDER SUCH CIRCUMSTANCES, AGAINST THE INSURER.

The automobile collision insurance policy may except the insurer from liability while insured is "driving in violation of law or contrary to the rules of the road." If so, the insurance company is not liable where the insured violates the law or rules of the road in driving his car. For exam-

78. Wetherill v. Williamsburgh City Fire Ins. Co., 60 Pa. Super. Ct. 37 (1915).

79. Freiberger v. Globe Indemnity Co., 205 App. Div. 116, 199 N. Y. S. 310 (1923).

80. O'Leary v. St. Paul F. & M. Ins. Co. (Tex. Civ. App.), 196 S. W. 575 (1917).

ple, in a Michigan case, where the insured, as he was approaching a road intersection, turned his car to the left to pass a truck traveling in the same direction. When he observed another automobile approaching on the intersecting road, he turned his automobile first to the right and then back to the left curb instead of falling in behind the truck. The insurance company was held not liable, as the case came within the exception clause of the policy.[81]

But where there is nothing in the policy exempting the company from liability because of the violation of law, and the insurance policy provides for the payment to insured of a certain amount of money for which insured shall become liable to pay as damages for property insured or destroyed, through collision of his automobile with another, the insurance company is liable for the value of the automobile destroyed in a collision between the automobiles at a speed in excess of that allowed by the state laws.[82]

In a case decided in the state of Mississippi, the policy, among other things, covered "sums which the assured shall become liable to pay for damage to property * * * through collision with any other automobile" * * *. The statute of the state made it unlawful to exceed thirty miles an hour upon a country road, and to go upon or approach a bridge at a rate exceeding ten miles per hour. Commenting upon the instructions of the lower court, the appellate court said: "Even if the plaintiff were exceeding either the thirty or the ten mile speed statute in this case, and thereby violating both of these statutes, this would not prevent him from recovering upon this policy. There is no provision in the policy providing for nonliability in case, at the time of an accident, the insured is violating the speed laws of the state * * *. There is nothing in the terms of the policy contrary to or violative of any public policy of the state. It is a perfectly valid contract of insur-

81. Ross v. Mich. Mut. Auto. Ins. Co., 224 Mich. 263, 195 N. W. 88 (1923).

82. Fireman's Fund Ins. Co. v. Haley, 129 Miss. 525, 92 So. 635 (1922), 23 A. L. R. 1470.

ance, and does not exempt the company from liability for a violation of the speed laws." [83]

In a Minnesota case the insured had been engaged in the saloon business and at the time in question had a soft drink establishment. At the time of the collision he was on an extended trip and had a considerable quantity of liquor in the car. The policy covered damage by collision when the automobile was being used for "pleasure and business causes." The evidence did not disclose that the insured was illegally transporting the liquor for purposes of illegal sale. Aside from the purpose of the insured in transporting the liquor, the court intimated that such use of the car did not place it within the purview of the provision of the policy limiting the liabilty of the insurer.[84]

§ 736. Age of driver.

INSURER NOT LIABLE WHERE COLLISION IS CAUSED BY MISMANAGEMENT AND NEGLIGENCE OF DRIVER UNDER AGE.

The collision policy or rider, generally speaking, excludes liability of the insurance company for damage resulting to the automobile "while being operated or used by any person contrary to law as to age, or any person under the age of sixteen (16) years where no statute restricts the age."

Under such a clause as construed by the court, there must be a casual connection between the driving of the car by the person under sixteen years of age and the injury in order to exempt the insurance company from liability.[85]

Where there exists such a casual connection and the collision is the result of the mismanagement and negligence of the driver, the insurer is not liable.[86]

Under such circumstances, the insurance company is ex-

83. Fireman's Fund Ins. Co. v. Haley, 129 Miss. 525, 92 So. 635 (1922), 23 A. L. R. 1470.

84. Cohen v. Chicago Bonding & Ins. Co., 146 Minn. 222, 178 N. W. 485 (1920).

85. Union Indemnity Co. v. Hossley, 142 Miss. 783, 107 So. 548 (1926).

86. Union Indemnity Co. v. Hossley, 142 Miss. 783, 107 So. 548 (1926).

empt from liability regardless of whether the owner of the insured car agrees for such person to drive the car or not, as the company does not assume the risk from such driving.[87]

§ 737. Bumpers—Promissory warranty.

REQUIREMENT THAT INSURED AUTOMOBILE SHALL BE EQUIPPED WITH BUMPERS IS IN THE NATURE OF A PROMISSORY WARRANTY, WHEN ASSURED OBTAINS REDUCED PREMIUM FOR SUCH EQUIPMENT.

The automobile collision insurance policy or rider sometimes provides that, in consideration of the reduced premium charge, the insured automobile shall be continuously equipped with bumpers. Under such circumstances, the insurer is not liable for damages resulting to the car from collision when the car is not so equipped. Such a provision in the policy is in the nature of a promissory warranty. In a Kentucky case, the damage to the insured automobile was caused by running into a telephone pole. The supreme court of that state said: "There is no controversy as to the facts. It is admitted that the car insured was not at the time of the collision equipped with front or rear bumpers. Appellee sought to avoid the bumper clause of the insurance contract by making it appear that the trunk rack attached to the rear of this car took the place of and afforded the same protection that a bumper would have afforded. The difficulty in sustaining that contention grows out of the fact that the trunk rack was a part of the equipment of the automobile, and under the express provisions and conditions of the policy assured agreed to protect it as well as the car proper with a bumper. It appears that the premium rate for collision indemnity where the automobile is protected by bumpers is considerably less then the rate where such is not the case. The policy written by appellant for and accepted by appellee was written at the lesser rate, and under the express agreement upon the part of insured

87. Hossley v. Union Indemnity Co. (earlier appeal), 137 Miss. 537. 102 So. 561 (1925).

that in consideration of the reduced premium charge the automobile would be continuously equipped with bumpers. Appellee argues that the provision in question is unreasonable because it specifies one particular bumper and none other that might be used. This case, however, does not present that question, because the automobile insured does not appear to have been equipped with the make of bumper specified by the policy or with a bumper of any make or design. The court is unable to perceive any way in which appellant may be held to be bound under the insurance contract sued on. Appellee had no insurance contract with appellant indemnifying him against damage to the insured automobile caused by a collision such as that which occasioned the damage herein when the car was not equipped with bumpers. On the other hand, under the policy issued at the premium rate paid, appellee was protected against such damage only in the event the car was so equipped. It being admitted that when the damage occurred the car was not so equipped, there is no way of escaping the conclusion that appellant, insurer, was not liable under the insurance contract held by appellee for the damage which resulted. Hence, the trial court at the conclusion of the evidence, erred in not peremptorily instructing the jury to find for appellant." [88]

§ 738 Negligence of third party.

The insured has a right to recover collision damage from the insurer where the insured truck collides with another truck which had no head lights and which gave no warning by horn or bell of its presence on the highway. Under such circumstances the insurance company is subrogated to the rights of the insured and has right of recovery against owner of truck doing the damage for the loss sustained.[89]

88. New York Indemnity Co. v. Hatcher, 218 Ky. 142, 291 S. W. 4 (1927).
89. Maxwell Gravel Co. v. Fisher (Ind.), 151 N. E. 618 (1926).

MEASURE OF DAMAGES.

AUTOMOBILE COLLISION INSURANCE ENDORSEMENT IS A CONTRACT OF INDEMNITY, UNLESS THE POLICY IS VALUED, UNDER WHICH THE ASSURED HAS A RIGHT TO RECOVER THE REASONABLE AMOUNT OF HIS DAMAGES.

§ 739. Measure of damages. (a) Contract of indemnity.

The automobile collision insurance policy or rider is a contract of indemnity under which there can be no recovery in the absence of loss, or in excess of the actual loss proven.[90]

§ 740. Measure of damages. (b) "Actual cost of repairing or replacing parts damaged or destroyed"—Construed.

Under a policy of automobile collision insurance stipulating that the company "shall be liable only for actual cost of repairing or replacing parts damaged or destroyed," the primary liability is for the difference between the value of the property immediately before the injury and its value immediately afterwards.[91] The stipulation usually contained in the collision rider that the liability shall not exceed the cost of repair or replacement is a subordinate provision, for affirmative defensive pleading, with facts showing its applicability, if the company should seek to reduce or limit its liability by reason thereof.[92]

The intention or contemplation is that the measure of damages should be the actual cost of repair, and it is proper to show the amount of damages, and that the repairs are reasonably worth the amount of the charge.[93]

"Replace" when used in the collision policy means repair or restore, and does not include the right to substitute. The insured has a right to recover the amount of damages

90. Hamilton F. Ins. Co. v. Gregor, 218 App. Div. 536, 218 N. Y. S. 534, rev. on other grounds, 246 N. Y. 162, 158 N. E. 60 (1927).

91. U. S. F. & G. Co. v. Corbett, 35 Ga. App. 606, 134 S. E. 336 (1926).

92. U. S. F. & G. Co. v. Corbett, 35 Ga. App. 606, 134 S. E. 336 (1926).

93. Lepman v. Employers Liability Assur. Corp., Ltd., of London, 170 Ill. App. 379 (1912).

done to his car, and he can properly refuse an offer of an insurer to give him a new automobile of like kind, model, and character, as the insured car injured in the collision. The liability of the insurance company is to pay the damages.[94] The court's analysis in an Alabama case throws considerable light on the question: "We do not think that the word 'replace' as used means the right to exchange cars or to substitute a new one for the old one, especially when the claim is damages for an injury as distinguished from a claim for a total destruction. In other words, the right to replace does not mean a right to exchange cars, notwithstanding such a thing may have been fair and more advantageous to the plaintiff. 'Replace' or 'replacement' does not ordinarily mean the right to exchange or substitute, but, when used in connection with the policy involved, means repair or restore."[95]

The provision of the collision policy or rider that the insurance company shall be liable for the actual cost of repairing the automobile in case of accident does not apply where the car is a total wreck or loss. It is intended to apply only when the damaged car is subject to repair.[96]

§ 741. Measure of damages. (c) Conditional vendor.

The conditional vendor of an insured automobile under a collision policy or rider is entitled to recover the damage to his interest in the car in case of accident; and where the car is reduced to a total wreck or is a total loss, his measure of damages is the value of his interest in the car as it existed just prior to the happening of the accident. In such a case of total loss, where the insured automobile had been in use but three weeks, it was error for the court to assume that the insured was entitled to recover the amount remaining due him on the purchase price, for the value of the car then was not the equivalent of the purchase price of the

94. Indemnity Ins. Co. of N. A. v. Gardner, 214 Ga. 528, 108 So. 342 (1926).
95. Indemnity Ins. Co. v. Gardner, 214 Ala. 528, 108 So. 342 (1926).
96. Center Garage Co. v. Columbia Ins. Co., 96 N. J. 456, 115 Atl. 401 (1921).

car. To what extent, if any, the value of the car was depreciated by such use was a question of fact for the jury, the court held, providing the proofs were sufficient for them to determine the fact.[97]

§ 742. Measure of damages. (d) Value of property.

Where the action is for total loss in an automobile collision, the petition is sufficient even though it does not allege the actual value of the car if it alleges that the car had depreciated in value and specifies the reasonable value thereof at the time of the accident.[98] Particularly is this true where the policy insured the automobile for a stated sum, and a statute provided that no company should take a risk on any property having a ratio greater than three-fourths of the value of the property insured, and that when taken its value should not be questioned in any proceeding.[99]

EVIDENCE.

§ 743. Evidence. (a) Accidental collision.

Where the evidence shows that the driver ran into a stump in necessary detour from regular roadway, it is sufficient to show "accidental collision."[1]

§ 744. Evidence. (b) Expert testimony.

Expert testimony of an automobile repairer was properly admissible in such a case (supra) that in his opinion the damage to the crank case was caused by some outside happening rather than a break on the inside.[2]

§ 745. Evidence. (c) Amount of damages—Jury.

Where the evidence in an automobile collision insurance

97. Center Garage Co. v. Columbia Ins. Co., 96 N. J. 456, 115 Atl. 401 (1921).
98. Wolff v. Hartford Fire Ins. Co., 204 Mo. App. 491, 223 S. W. 810 (1920).
99. Wolff v. Hartford Fire Ins. Co., 204 Mo. App. 491, 223 S. W. 810 (1920).
1. Yorkshire Ins. Co. v. Bunch-Morrow Motor Co., 212 Ala. 588, 103 So. 670 (1925).
2. Yorkshire Ins. Co. v. Bunch-Morrow Motor Co., 212 Ala. 588, 103 So. 670 (1925).

case is uncontroverted that the insured automobile had been injured as the result of a collision, the court properly leaves the question as to the amount of damages sustained by the automobile to the jury.[3]

§ 746. Evidence. (d) Total loss.

The evidence is not sufficient to submit to a jury on the theory of total loss even though some of the witnesses testify that the car can not be repaired so as to properly operate, but admit that every injured or destroyed part can be repaired or replaced.[4]

§ 747. Evidence. (e) Dismissal.

Where the insured, in an action on a policy covering collision, showed that his radiator was smashed and certain other parts of his automobile destroyed, he was at least entitled to judgment for nominal damages, and the dismissal of his complaint at the conclusion of the plaintiff's evidence was error, notwithstanding want of proper evidence as to the money value of the damage done.[5]

§ 748. Evidence. (f) "Suitable repair and replace".

It is not error in an action on an automobile collision policy to ask a witness whether new body was required to "suitably repair and replace" the damage sustained by the car.[6]

§ 749. Burden of proof.

In an action on an automobile policy insuring against collision with moving or stationary objects the burden is

3. Indemnity Ins. Co. of North America v. Gardner, 214 Ala. 528, 108 So. 342 (1926).

4. Wolff v. Hartford F. Ins. Co., 204 Mo. App. 491, 223 S. W. 810 (1920).

5. Wilson, Bryant Co., Inc. v. Agricultural Ins. Co. of Watertown, 171 N. Y. S. 218 (1918).

6. Standard Accident Ins. Co. v. Richmond (Tex. Civ. App.), 297 S. W. 879.

on assured to show that the damage sustained is the result of such collision.[7]

§ 750. Erroneous instruction.

An instruction that if the jury were in doubt and unable to say whether the upset was due to the car striking a brick or to a sudden turn given the steering gear by the chauffeur or to some unknown cause no recovery could be had was properly refused where there was no evidence that the chauffeur, at the time of the accident, gave a sudden turn to the steering gear, for such an instruction would have suggested to the jury that they could speculate or conjecture as to the cause of the accident.[8]

§ 751. Loss sustained—Payment of judgment.

Under an automobile indemnity policy covering assured for accidental automobile collision and providing that the assured shall not be reimbursed except for loss actually sustained and paid in money by him, it has been held in an action by the assured to recover from the company the amount of a judgment recovered against him, there was no error in the admission of testimony that real estate owned by the assured was sold on execution to satisfy the judgment for the sum of $700. The legal effect of such sale was a cash payment by the assured and the amount of such sale was a loss actually sustained, under a reasonable construction of the policy.[9]

7. Continental Casualty Company v. Paul, 209 Ala. 166, 95 So. 814 (1923), 30 A. L. R. 802.

8. Lepman v. Employers' Liability Assur. Corp., Ltd., 170 Ill. App. 379 (1912).

9. McKenna v. International Indemnity Co., 125 Wash. 28, 215 Pac. 66 (1923).

CHAPTER XXIII.

CONVERSION OR EMBEZZLEMENT INSURANCE.

SECTION.

752. In general.
753. Valid.
754. Conditional purchaser.
755. Policy insuring vendor and vendee, as their interests may appear.
756. Joinder.
757. Riders.—Ambiguity.
758. Notice.—Default in payment.
759. Proof of loss—Waiver—Denial on other grounds.
760. Registration—Waiver.

§ 752. In general.

This subject has in a way been indirectly considered, necessarily, in the chapter on theft insurance from which it is, generally speaking, inseparably connected. Conversion or embezzlement of the automobile, by reason of a broad statutory definition to the term "theft," may be covered by the theft policy,[1] unless the policy contains a clause excepting the insurer from liability for "the wrongful conversion, embezzlement, or secretion by a mortgagor or vendee in possession under mortgage, conditional sale, or lease agreement," or clause of similar meaning.[2] Where

1. James v. Phoenix Assur. Co., 75 Colo. 209, 225 Pac. 213 (1924); Schmid v. Heath, 173 Ill. App. 649; Fed. Ins. Co. v. Hiter, 164 Ky. 743, 176 S.W. 210, L. R. A. 1915E, 575; Ludwig v. Pacific Fire Ins. Co. of New York, 123 Misc. 189, 204 N. Y. S. 465 (1924); Fidelity Phoenix Fire Ins. Co. of New York v. Oldsmbile Sales Co. (Tex. Civ. App.), 261 S. W. 492 (1924); Security Ins. Co. v. Sellers-Sammons-Signor Motor Co. (Tex. Civ. App.), 235 S. W. 617; Home Ins. Co. v. Paul, 128 Okla. 142, 261 Pac. 927.

2. Gulf Finance & Securities Co. v. Atlas Assur. Co., 5 La. App. 91 (1926); Rydstrom v. Queen Ins. Co. of America, 137 Md. 349, 112 Atl. 586, 14 A. L. R. 212 (1921); Meyer Dairy Equipment Co. v. Connecticut Fire Ins. Co. (Mo. App.), 287 S. W. 663 (1926); Stewart v. Home Fire & Marine Ins. Co. of California, 2 N. J. Misc. 515, 124 Atl. 773 (1924); Royal Ins. Co. v. Jack, 113 Ohio St. 153, 148 N. E. 923, 46 A. L. R. 529 (1925); Great American Mutual Indemnity Co. v. Meyer, 18 Ohio App. 97 (1924); Home Ins. Co. v. Paul, 128 Okla. 142, 261 Pac. 927 (1927); Security Ins. Co. v. Sellers-Sammons-Signor Motor Co. (Tex. Civ. App.), 235 S. W. 617 (1921); Fidelity Phoenix Fire Ins. Co. of New York v. Oldsmobile Sales Co. (Tex. Civ. App.), 261 S. W. 492

conversion or embezzlement coverage is particularly desired, the practice is to give definite coverage in the form of a special rider or endorsement for which an extra premium is usually required.[3] The policy is written so that it definitely covers "wrongful conversion," "embezzlement" or "concealment" of the insured car, or words which import such coverage.[4]

§ 753. Valid.

It has been held that insurance indemnifying vendor against loss from confiscation resulting from vendee's violation of law is not against public policy.[5] Such a policy

(1924); Southern Casualty Co. v. Landry (Tex. Civ. App.), 266 S. W. 804 (1924); Continental Ins. Co. v. Dillow (Tex. Civ. App.), 273 S. W. 624 (1925); Northern Assur. Co., Ltd. v. Gross (Tex. Civ. App.), 1 S. W. (2d) 369 (1927); O. M. Gaudy Inc. v. North Carolina Home Ins. Co., 145 Wash. 375, 260 Pac. 257 (1927).

3. Pennsylvania Fire Ins. Co. v. Johnson, 28 Ariz. 448, 237 Pac. 634 (1925); Bell v. Hanover Fire Ins. Co., 107 Or. 513, 214 Pac. 340, 215 Pac. 171 (1923); American Central Ins. Co. v. Weller, 106 Or. 494, 212 Pac. 803 (1923); Milwaukee Mechanics' Ins. Co. v. Weathered (Tex. Civ. App.), 234 S. W. 568 (1921); Piper v. Dennis (Tex. Civ. App.), 274 S. W. 307 (1925); Skoug v. Hartford Accident & Indemnity Co., 124 Wash. 293, 214 Pac. 155 (1923); Kutzen Automobile Co. v. North British & Mercantile Ins. Co., 127 Wash. 650, 221 Pac. 339 (1923); Wyley v. Federal Ins. Co., 136 Wash. 686, 241 Pac. 292 (1925).

4. Pennsylvania Fire Ins. Co. v. Johnson, 28 Ariz. 448, 237 Pac. 634 (1925); Buxton v. International Indemnity Co., 47 Cal. App. 583, 191 Pac. 84 (1920); Lozier Automobile Exchange v. Interstate Casualty Co., 197 Iowa 1130, 198 N. W. 501 (1924); Automobile Finance & Securities Co. v. Globe Indemnity Co., 161 La. 303, 108 So. 545 (1926); Bell v. Hanover Fire Ins. Co., 107 Or. 513, 214 Pac. 340, 215 Pac. 171 (1923); American Central Ins. Co. v. Weller 106 Or. 494, 212 Pac. 803 (1923); Milwaukee Mechanics' Ins. Co. v. Weathered (Tex. Civ. App.), 234 S. W. 568 (1921); Piper v. Dennis (Tex. Civ. App.), 247 S. W. 307 (1925); Massachusetts Bonding & Ins. Co. v. Texas Finance Corp. (Tex. Civ. App.), 258 S. W. 250 (1924); Skoug v. Hartford Accident & Indemnity Co., 124 Wash. 293, 214 Pac. 155 (1923); Knutzen Automobile Co. v. North British & Mercantile Ins. Co., 127 Wash. 650, 221 Pac. 339 (1923); Seattle Dodge Service Co. v. Royal Ins. Co., 135 Wash. 524, 228 Pac. 568 (1925); Wyley v. Federal Ins. Co., 136 Wash. 686, 241 Pac. 292 (1925); O. M. Gaudy v. North Carolina Home Ins. Co., 145 Wash. 375, 260 Pac. 257 (1927); Bankers Financial Corp. v. Canada Accident & Fire Assurance Co., Ltd., 53 Ont. L. Rep. 620 (1923).

5. Fidelity & Deposit Co. of Maryland v. Moore (Ore. D. C.), 3 Fed. (2nd) 652 (1925).

indemnifying against confiscation for violation of law is valid.[6]

§ 754. Conditional purchaser.

WHERE A CONDITIONAL PURCHASER OF AN AUTOMOBILE ON THE INSTALLMENT PLAN GIVES A MORTGAGE ON THE CAR TO SECURE THE UNPAID PURCHASE PRICE, DISAPPEARS WITH THE CAR, IT CONSTITUTES A "LOSS THROUGH WRONGFUL CONVERSION, AMOUNTING TO LARCENY OR EMBEZZLEMENT."

A purchaser of an automobile who has secured the unpaid balance of the purchase price by executing a chattel mortgage and giving his promissory note to the seller becomes the lawful holder and owner of the car. He is holder of the legal title, and does not commit the crime of theft or embezzlement, within the common meaning of the words, by disappearing with the car. But such conduct is a conversion of the interest of the seller, as represented by the chattel mortgage, and constitutes a "loss through the wrongful conversion, amounting to larceny or embezzlement," within the meaning of a rider attached to theft policy. The seller may protect his interest in the car to the extent of the unpaid purchase price by insuring against conversion or embezzlement by the purchaser.[7] Mortgagee or finance company, also, has legal right to protect its interest in a car which has not been fully paid for or against

6. Midland Motor Co. v. Norwich Union Fire Ins. Soc., 72 Mont. 583, 234 P. 482 (1925).

7. Lozier Auto. Exch. v. Interstate Casualty Co., 197 Iowa 935, 195 N. W. 885 (1924); Lozier Auto. Exch. v. Interstate Casualty Co., 197 Iowa 1130, 198 N. W. 501 (1924); American Central Ins. Co. v. Weller, 106 Or. 494, 212 Pac. 803 (1923); Piper v. Dennis (Tex. Civ. App.), 274 S. W. 307 (1925); Milwaukee Mechanics' Ins. Co. v. Weathered (Tex. Civ. App.), 234 S.W. 568 (1921); Pennsylvania Fire Ins. Co. v. Johnson, 28 Ariz. 448, 237 Pac. 634 (1925); Buxton v. International Indemnity Co., 47 Cal. App. 583, 191 Pac. 84 (1920); Bell v. Hanover Fire Ins. Co., 107 Or. 513, 214 Pac. 340; 215 Pac. 171 (1923); Skoug v. Hartford Accident & Indemnity Co., 124 Wash. 293, 214 Pac. 155 (1923); Knutzen Auto. Co. v. North British & Mercantile Ins. Co., 127 Wash. 650, 221 Pac. 339 (1923); Seattle Dodge Service Co. v. Royal Ins. Co., 135 Wash. 524, 238 Pac. 568 (1925); Automobile Finance & Securities Co. v. Globe Indemnity Co., 161 La. 303, 108 So. 545 (1926).

which there is a lien or encumbrance by taking out policy of insurance against conversion.[8]

"Stealing" is a larger term than robbery, and may include appropriation of things which are not technically a subject of larceny. So it has been held in a California case that where the policy provides that it shall cover theft of automobile by vendee in possession under conditional sales contract, it shall cover and include embezzlement or unlawful conversion by such a vendee.[9]

This question received careful consideration in a Texas case, the court saying: "The question involved in this appeal is whether Carter, by the commission of the said wrongful acts above given, through the means of which he rendered it impossible for appellants either to repossess themselves of the car or to subject it to the payment of their debt through foreclosure of their mortgage lien, created a contingency which is covered by the policy of insurance. This must be determined by what reasonably appears to have been the intention of the parties, deduced from the terms of the insurance contract when construed in the light of the facts existing at the time the insurance contract was executed. If, when so viewed, this contract is susceptible to a reasonable construction that will allow a recovery, such construction must be adopted, notwithstanding there may be another reasonable construction that would deny a recovery. * * * The circumstances that would tend to manifest the intention of the parties are that appellants had made a contract of sale under the terms of which the purchaser, by the payment of a small sum in cash, was given possession of the automobile, with the relatively large deferred payment secured only by a chattel mortgage on the car. It was manifest to both the insurer and the insured that this security could be easily destroyed by the very means subsequently used by the purchaser, as well as by a

8. Automobile Finance & Securities Co. v. Globe Indemnity Co., 161 La. 303, 108 So. 545 (1926); Massachusetts Bonding & Ins. Co. v. Texas Finance Corp. (Tex. Civ. App.), 258 S. W. 250 (1924).

9. Buxton v. International Ind. Co., 47 Cal. App. 583, 191 Pac. 84 (1920).

sale of the car and a misapplication of the proceeds. In the commission of either of said acts, Carter could not be successfully prosecuted for the offense of embezzlement or the offense of larceny, for such acts would not come within the technical definition of either of such offenses. His legal possession of the automobile was a right incident to his contract of purchase, and rendered it impossible for him to commit these offenses by means of said acts. Appellee received the consideration and extended the policy of insurance to indemnify appellants against any loss 'through the wrongful conversion amounting to larceny or embezzlement of the motor vehicle described by the person named herein as purchaser.' What contingency growing out of the wrongful acts of the purchaser did the insurer intend to insure against by use of the indefinite phrase 'wrongful conversion amounting to larceny or embezzlement'? Evidently not a wrongful conversion through the commission of either the crime of theft of the car or its embezzlement, for these offenses could not be committed by the purchaser by any use he might make of this car. While not amounting to one of the crimes mentioned in the policy, the purchaser could, and did, wrongfully convert to his own use the interest appellants had in the car represented by their chattel mortgage. Such conversion was the only possible wrongful conversion the purchaser could have committed under the circumstances attending his possession of the car. It is reasonable to conclude that both insurer and insured had reference to a future contingency as to the purchaser's possession of this car that might arise, rather than to a future contingency that could in no event arise. We therefore conclude that the parties contracted in reference to the wrongful conversion of appellant's interest in the car as mortgagees. Was this a wrongful conversion 'amounting to larceny or embezzlement'? We think so, for it destroyed just as effectually appellants' said interest in the car, without their knowledge or consent, as would have been done by the commission of such acts as technically constitute either one of these offenses, and there was

just as complete an application of appellants' said interest in the car to the benefit of the wrongdoer. In other words, the total effect of the purchaser's act of conversion was equal to larceny or embezzlement."[10]

An automobile finance company purchased notes secured by a chattel mortgage on an automobile sold by the dealer from whom the notes were purchased, and the car was later repossessed by the dealer who paid some of the notes but not all, and who then sold the car as unencumbered and the buyer removed it from the state thereby extinguishing the chattel mortgage. It was held that the insurer was liable for the loss under a policy indemnifying the finance company against direct pecuniary loss by the purchaser's conversion depriving the company of its security.[11]

§ 755. Policy insuring vendor and vendee, as their interests may appear.

In a New York case, the vendor and vendee, under conditional sales contract, were insured, as their interests might appear, under one insurance policy, against theft, robbery and pilferage, by any person or persons other than those in the employment, service, or household of the insured. The conditional vendee left the state with the car, and thereafter claimed that the car had been stolen from him, gave notice to the insurance company, and assigned his claim under the policy to the conditional vendor. The court held that the conditional vendor had a right of recovery for the loss even though the conditional vendee had stolen the car.[12]

§ 756. Joinder.

Dealer who had insurance policy covering conversion of cars sold on conditional sale contracts was held not obligated in one suit to joint claims for different conversions,

10. Piper v. Dennis (Tex. Civ. App.), 274 S. W. 307 (1925).

11. Automobile Finance & Securities Co. v. Globe Indemity Co., 161 La. 303, 108 So. 545 (1926).

12. Neal, Clark & Neal Co. v. Liverpool, London & Globe Ins. Co., 178 App. Div. 730, 165 N. Y. S. 204 (1917).

and he was not precluded by a judgment based on the conversion of one of such cars from suing separately for the conversion of another.[13]

§ 757. Riders—Ambiguity.

Automobile insurance policy issued jointly to vendor and vendee contained two riders, one limiting liability in Mexico to fifteen days and the other insuring vendor against fraudulent concealment or disposal of the car by vendee. Vendee took the car to Mexico and refused to return it before the limit of fifteen days had expired. The court held that such retention by vendee did not void policy and vendor could recover under second rider for vendee's conversion.[14]

§ 758. Notice—Default in payment.

An indemnity policy against conversion of an automobile by a conditional vendee requiring assured to give immediate notice of any event which may become the basis of a claim by assured, did not require assured to notify the company of the conditional vendee's default in payment of the car.[15]

§ 759. Proof of loss—Waiver—Denial on other grounds.

Delay of assured in giving notice of loss under embezzlement policy covering automobiles and failure to swear to written statement of loss was waived by insurance company by answer admitting receipt of claim and subsequent letter refusing claim on ground that car was not properly registered.[16]

§ 760. Registration—Waiver.

It has been held in a recent California case that the right of the assured to recover for embezzlement of automobile

13. Lozier Automoible Exchange v. Interstate Casualty Co., 197 Iowa 935, 195 N. W. 885 (1923).

14. Pennsylvania Fire Ins. Co. v. Johnson, 28 Ariz. 448, 237 Pac. 634 (1925).

15. Lozier Automobile Exchange v. Interstate Casualty Co., 197 Iowa 935, 195 N. W. 885; 197 Iowa 1130, 198 N. W. 501 (1924).

16. Hutchings v. Southwestern Automobile Ins. Co. of Los Angeles, —— Cal. App. ——, 274 Pac. 79 (1929).

was not defeated because of the fact that automobile was not registered in plaintiff's name at time insurance policy was issued, as required by policy provision making registration in owner's name at time of issuance of policy a condition precedent, for insurer waived provision by failure to inquire of assured as to the registration or to investigate records in office of motor vehicle department, where assured was actually the owner of the car.[17]

17. Hutchings v. Southwestern Automobile Ins. Co. of Los Angeles, —— Cal. App. ——, 274 Pac. 79 (1929).

CHAPTER XXIV.

TRANSPORTATION INSURANCE.

SECTION.

761. In general.
762. Illustrations—Ferry boat.
763. Elevator.
764. Derailment.
765. Transit policy.
766. Exclusion clauses—Transportation of goods or merchandise.

§ 761. In general.

Transportation automobile insurance is usually written in connection with the fire and theft policy. The transportation clause usually provides that the property is insured against loss "while being transported in any conveyance by land or water, the stranding, sinking, collision, burning or derailment of such conveyance, including general average and salvage charges for which the assured is legally liable."[1]

§ 762. Illustrations—Ferry boat.

Loss of an automobile sinking into water when the rear wheels pushed back the ferry boat from which it was being driven after being transported across a river, was covered by insurance policy insuring against sinking while being transported in any conveyance by land or water.[2]

In an action on policy insuring an automobile against sinking in conveyance by water, where the ferry boat on which the automobile was being conveyed submerged, the insurer was liable for the loss of the automobile, although the barge rose again to the surface of the water. Unseaworthiness of the ferry was no defense.[3]

1. Form approved by National Convention of Insurance Commissioners, December, 1919.

2. Importers' and Exporters' Ins. Co. v. Jones, 166 Ark. 370, 266 S. W. 286 (1925).

3. American Automobile Ins. Co. v. Fox (Tex. Civ. App.), 218 S. W. 92 (1920)

Where the policy covered loss to the insured automobile while being transported in any conveyance by land or water, the insurer was liable for damage to the car caused by it running off a ferry boat moored to the shore, while it was being driven on to the boat to be ferried across the river.[4]

But it has been held that where the policy insured against loss of the automobile "while being transported in any conveyance—stranding, sinking, collision, burning or derailment of such conveyance," there could be no recovery where the car while being ferried across a river, suddenly started forward, for some unknown reason, and ran off the end of the ferry boat and sunk.[5]

§ 763. Elevator.

The automobile insurance policy provided that the car was insured against damages while "being transported in any conveyance by land or water, the stranding, sinking, collision, burning or derailment of such conveyance * * *." While the automobile was being transported in an elevator to the storage room on the ground floor, the elevator dropped to the bottom of the shaft, and the automobile was wrecked. The court held that the loss was the result of a collision and that the insurer was liable.[6]

§ 764. Derailment.

A transportation certificate of insurance, in the margin of the certificate, contained the following words: "This insurance is only against loss or damage by fire, collision or derailment on land, and marine perils while on ferries and transfers." In the body of the certificate it was provided: "Shipped by automobile truck * * * to destination * * * covering only while in transit by land." While the property was in the course of transportation by

4. Wheeler v. Globe & Rutgers Fire Ins. Co., 125 S. C. 320, 118 S. E. 609 (1923).

5. Johnson v. Glens Falls Ins. Co., 131 S. C. 253, 127 S. E. 14 (1925).

6. National Fire Ins. Co. v. Elliott (U. S. C. C. A.), 7 Fed. Rep. (2nd) 522 (1925), 42 A. L. R. 1123.

automobile truck the wheels of the truck skidded into the gutter, causing the truck to capsize and damage the property insured. The court held that the skidding of the hind wheels of the truck into the gutter could not be considered a "derailment," as such word is defined, as the "act of going off, or state of being off the rails of the railroad."[7]

§ 765. Transit policy.

Where "transit policy" insured plaintiff against loss of goods in their possession (either inside or outside all buildings) and "in transit between Port Huron and the Thumb district," but expressly provided that the policy did not attach while the property insured was located in or on the premises of assured "in any garage or other building where the truck herein described is usually kept," it was held that no recovery could be had for theft of goods loaded into truck on Friday and placed in garage adjoining assured's store until the following Monday.[8]

§ 766. Exclusion clauses—Transportation of goods or merchandise.

Where a liability policy insured against loss or damage for injuries sustained by reason of ownership, maintenance, or use of the automobile while being used for "private and pleasure purposes, and all ordinary business uses for which vehicles are suitable, except * * * transportation or delivery of goods or merchandise," the court held that the use of the automobile for towing a buggy belonging to a friend, purely as a matter of accommodation, was not such a use as to bring it within the meaning of the exclusion clause, even assuming that the buggy fell within the meaning of the term "goods or merchandise" as used in the clause.[9]

7. Graham v. Ins. Co. of North America, 220 Mass. 230, 107 N. E. 915 (1915).

8. Seitovitz v. U. S. Fire Ins. Co. of City of N. Y., 237 Mich. 286, 211 N. W. 641.

9. Juszkiewicz v. New Jersey Fidelity & Plate Glass Ins. Co., 210 App. Div. 675, 206 N. Y. S. 566 (1924).

CHAPTER XXV.

LIABILITY INSURANCE.

A. PUBLIC POLICY.

SECTION.
767. In general.
768. Legislation.
769. Statutory regulations. (a) Operating car without license.
770. (b) Operating car by one under statutory age.
771. (c) Policy conditions—Validity.
772. Liability for criminal negligence.
773. Same—Where negligent conduct constituted criminal offense—Distinguished.
774. Indemnity bond insuring against violation of city ordinance.
775. Negligence.
776. Insurer conducting defense.

B. INDEMNITY AND LIABILITY INSURANCE.

777. In general.
778. Indemnity and liability insurance distinguished.
779. Liability policy—Rule of construction.
780. Illustrations.
781. Insurer's Liability subject to conditions of policy.
782. Injured claimant's right of action.
783. Garnishment.
784. Estoppel.
785. "No action" clause—Indemnity policy. (a) In general.
786. (b) General rule.
787. (c) Rule applied.
788. (d) Absence of "No action" clause.
789. (e) Garnishment.
790. (f) Bankruptcy or insolvency.
791. (g) In equity—Receivership.
792. (h) Paying judgment with promissory note, etc.
793. (h1) Miscellaneous—Execution sale.
794. (h2) Borrowed money.
795. (i) Minority view.

C. RIGHT OF INJURED CLAIMENT TO RECOVER FROM INSURER.

796. In general.
797. Terms of policy.
798. Privity of contract.
799. Policy creating separate right of action.
800. Insurer's liability—Policy inuring to benefit of injured claimants.

SECTION.
801. (a) Car operated with consent of owner—Evidence.
802. (b) Joint tort feasor.
803. (c) Public conveyance for carrying passengers.
804. Liability imposed by law.
805. Judgment—To what extent conclusive.
806. Same—When obtained without knowledge of insurer.
807. Statutes.
808. Same—Insolvency.
809. Procedure—Pleading and practice. (a) Right of action—Partnership.
810. (b) Judgment on writ of inquiry—Notice.
811. (c) Parties.
812. (d) Same—Constitutionality.
813. (e) Joint defendants—Burden of proof.
814. (f) Time of action.
815. (g) Defense.
816. (h) Same—Right to repudiate liability.
817. (i) Execution unsatisfied.
818. (j) Same—Joinder.
819. (k) Costs.

D. NOTICE OF ACCIDENT OR CLAIM.

820. In general.
821. Condition precedent.
822. Rule of reasonable construction.
823. Due diligence.
824. Newspaper notice.
825. Notice to broker.
826. Notice not necessary where insurer party to suit.
827. Miscellaneous illustrations.
828. Notice as affecting rights of injured claimant.
829. Pleading.
830. "Loss"—Construed.
831. Statute.
832. Waiver. (a) In general.
833. (b) Waiver clause construed.
834. (c) Option to defend or deny liability for failure to give notice.
835. (d) Pleading.
836. (e) Proof of notice.
837. (f) Burden of proof.

E. AGREEMENT TO DEFEND.

838. In general.
839. Criminal suits not included.
840. Refusal to defend.
841. Election to defend.
842. Assured may make settlement.
843. Settlement without judgment.

SECTION.
844. Waiver.
845. Reserving question of liability.
846. Laches.
847. Knowledge.
848. Malpractice as defense.
849. Insurer's liability for failure to defend.
850. Liability fixed by amount of policy.
851. Liability for failure to perfect appeal.
852. Burden of proof—Evidence.
853. Burden of proof—Optional contract.
854. Right to abandon—Estoppel by conduct.
855. Insurer liable for court costs.
856. Expenses for investigation.
857. Bond and poundage fees as costs.
858. Attorney fees.
859. Exception.
860. Private counsel.
861. "No action clause."

F. COOPERATION OF ASSURED.

862. In general.
863. Assured's obligation to cooperate.
864. What cooperation means.
865. What constitutes failure to cooperate.
866. Prosecution of assured's action.
867. Refusal of assured to defend on ground of contributory negligence.
868. Discrepancy in statement.
869. Mistake.
870. Error.
871. Assured insolvent.
872. Waiver
873. Jury.

G. SETTLEMENT.

874. In general.
875. Settlement by insurer.
876. Liability limited to face amount of policy.
877. Right of assured to protect himself against excess liability.
878. Settlement by assured without consent of insurer.
879. When insurer refuses to defend.
880. (a) Evidence.
881. (b) Waiver.
882. (c) Clause for payment after trial and judgment construed.
883. (c1) Settlement on recommendation of insurer's attorney.
884. Settlement after judgment.
885. Duress.
886. No provision that insurer shall defend.

SECTION.
887. Releases insurer from liability.
888. Clause prohibiting assured from interfering with settlement of suits construed.
889. "To interfere in negotiations for compromise"—Construed.
890. Insurer not liable where assured voluntarily pays judgment against daughter.
891. Execution creditor.
892. Evidence—In action where judgment exceeded amount of insurance.

H. INSURER'S LIABILITY—IN GENERAL.

893. Contract of insurance.
894. Accident—Definition.
895. Negligence.
896. Use at time of accident.
897. Claims on account of bodily injuries.
898. What constitutes "one accident."
899. Valued policy.
900. Appreciation in value.
901. Interest.
902. Policy issued to partnership.
903. Accident "caused by automobile"—Construed.
904. Measure of recovery.
905. Duress.
906. "Use in public service"—Construed.
907. "Use and operation of vehicles in insured's business"—Applied.
908. Injuries sustained by president—Construed.
909. Change of motor.
910. "One driver" clause.
911. "Use by himself"—Construed.
912. When insurer not liable for acts of assured's chauffeur.
913. "Loss and expense by reason of claims made upon assured"—Construed.
914. Liability policy for public benefit—Jitney policy.
915. Where insurer obligates itself to greater extent than required by statute—No defense.
916. Liability of insurer for negligence of dependent members of insured's family.
917. Change of interest.
918. Same—City ordinance.
919. Test of business uses.
920. Assured's loss as member of partnership.
921. Violation of speed law.
922. Assured signing minor's application for license.
923. "Other's liability assumed under contract"—Construed.
924. Assured's right of recovery for wife's injuries.
925. Deductible clause.
926. Omnibus coverage clause. (a) In general.
927. (b) Assured—Defined.

SECTION.
928. (c) Additional assured—Defined.
929. (d) Permission to use—Construed.
930. (e) Not words of limitation.
931. (f) Not an accident policy.
932. Age limit. (a) In general.
933. (b) Valid.
934. (c) Illustrations.
935. (d) Statute.
936. (e) Estoppel.
937. (f) Evidence.
938. (g) Burden of proof.

I. PROCEDURE.

939. When action accures.
940. Venue.
941. Res adjudicata.
942. Same.
943. Attorney fees.
944. Vexatious refusal to pay.
945. Illustration.
946. Failure to appeal—Measure of damages.
947. Pleading. (a) Presumption as to expiration of policy.
948. (b) Sufficiency as to averment of non-payment.
949. (c) Answer—Sufficiency—Appeal bond.
950. (d) Defense—Negligence.
951. (e) Same—Wrongful interference with contractual rights.
952. Evidence. (a) Existence of insurance.
953. (b) Cross-examination.
954. (c) Person driving car.
955. (d) Fraudulent release.
956. (e) Authority of adjuster.
957. (f) Negligence—Chauffeur.
958. Jury—Right to trial by.
959. Judgment. (a) Excessive.
960. (b) Collateral attack.
961. (c) Insolvent judgment creditor.
962. (d) Interest.
963. (e) Costs—Deductible clause.

A. PUBLIC POLICY.

LEGISLATIVE DECLARATIONS, WHEN EXISTING, DETERMINE THE PUBLIC POLICY OF THE STATE.

LEGISLATURES HAVE MANIFESTED RECOGNITION AND APPROVAL OF INSURANCE COMPANIES INDEMNIFYING AGAINST THE CONSEQUENCES OF NEGLIGENCE, WHETHER PERSONAL OR VICARIOUS; EVEN WITHOUT LEGISLATION, CERTAIN COURTS HAVE RECOG-

NIZED THE RIGHT OF INSURANCE COMPANIES TO ENTER INTO SUCH CONTRACTS.

VIOLATION OF STATUTE. ASSURED'S RIGHT OF RECOVERY UPON VALID LIABILITY CONTRACT IS NOT DEFEATED BY INCIDENTAL VIOLATION OF STATUTE, OR EVEN WHEN ASSURED IS CRIMINALLY LIABLE. BUT THERE IS AUTHORITY OTHERWISE IF ASSURED'S CRIMINAL MISCONDUCT IN ITSELF IS THE DIRECT OR PROXIMATE CAUSE CONTRIBUTING TO THE INJURY.

§ 767. In general.

Liability insurance contract is not contrary to public policy. Such an insurance contract, instead of prejudicing the victim of an accident, supplies in many cases the only fund from which the victim can be paid.[1]

Even without the aid of legislation, the supreme court of the United States, as well as other courts of high standing, have reached similar conclusions.[2]

It has been held by an English court that an indemnity policy is not a gaming or wagering contract where, in addition to covering such other risks as fire, insures "against all sums for which the insured (or any licensed personal friend or relative of the insured while driving the car with the insured's general knowledge and consent) shall become legally liable in compensation for loss of life or accidental bodily injury caused to any person."[3]

§ 768. Legislation.

The public policy of the state, when the legislature acts, is what the legislature determines it shall be.[4]

1. Phoenix Ins. Co. v. Erie & Western Transp. Co., 117 U. S. 312, 29 L. Ed. 879, 6 Sup. Ct. Rep. 750, 1176; American Casualty Ins. Co.'s Case (Boston & Albany Railroad Co. v. Mercantile Trust & Deposit Co., 82 Md. 535, 34 Atl. 778, 38 L. R. A. 97.

2. Phoenix Ins. Co. v. Erie & W. Transp. Co., 117 U. S. 312, 29 L. Ed. 873, 6 Sup. Ct. Rep. 750; American Casualty Ins. Co's Case (Boston & Albany Railroad Co.) v. Mercantile Trust & Deposit Co., 82 Md. 535, 34 Atl. 778, 38 L. R. A. 96; Trenton Pass. Ry. Co. v. Guarantor's Liability Indem. Co., 60 N. J. L. 246, 37 Atl. 609, 44 L. R. A. 213; Gould v. Brock, 221 Pa. 38, 69 Atl. 1122.

3. Williams v. Baltic Ins. Ass'n (1924), 2 K. B. (Eng.) 282.

4. Demarest v. Flack (Demarest v. Grant), 128 N. Y. 205, 28 N. E. 645, 13 L. R. A. 854; Lancaster v. Amsterdam Improv. Co., 140 N. Y. 576, 583, 35

The authority of insurance companies to write automobile insurance and the extent of the coverage is to be determined by statutory enactments of the different states. Generally speaking, insurance on the car has been written by fire and marine companies, while the "third party" liability insurance has been written by the casualty companies. In many states, however, by statutory enactment, an insurer that is licensed to write any one of these coverages on automobiles is authorized to write them all.

It has been held in the state of Iowa, where the company under the statute was authorized "to insure the health of persons, and against personal injuries, disablement, or death resulting from traveling or general accident," it has no authority to write indemnity policies for automobile owners. It was further held in the case in question that where the foreign insurer had been incorporated in another state with the power to write such policies, such authority could not be exercised contrary to the statutes of the state in which it had been licensed to do business on the ground of comity.

The court said: "Where it is the manifest intention to limit or restrict the powers given to such corporation by its charter, courts have no authority to override such legislation on the ground of comity between the states. Within its power, the state, through its legislature, is supreme, and the court's duty is ended when it determines what the statutory law is. The attorney general urges that it would be against public policy to permit such insurance as the appellant proposes. If it is meant that it would contravene the declared policy of the state, we fully agree with the contention. But if it is contended that sound, undeclared public policy demands a denial of such policies of insurance, we cannot agree to the proposition. Out of the nearly 50,000 drivers of automobiles in this state, there may be a few who

N. E. 964, 24 L. R. A. 322; Janson v. Driefontein Mines (1902) A. C. 484, 5 B. R. C. 810, 71 L. J. K. B. N. S. 857, 87 L. T. N. S. 372, 18 Times L. R. 796, 7 Com. Cas. 268; Anson, Contr. Corbin's Ed. p. 286.

are so careless and heedless about the lives and limbs of their neighbors as to be unworthy of any kind of protection. On the other hand, accidents may happen to the other large class of drivers, and men who are law abiding, and who are careful not to injure even a stray dog or an old hen that persists either in crossing the road just ahead of the car or under it, and this great majority of decent drivers should not be denied reasonable protection because of the recklessness of a few."[5]

So, it was held in a Michigan case, where the statute authorized the incorporation of companies "to make insurance on automobiles, whether stationary or being operated under their own power, against any hazard," the insurers had no authority under the statute in question to write public liability policies.

The court said: "The language of the statute is not complex. Authority is given to make insurance on automobiles. If it was an insurance on the automobile against fire, that would be a recognized hazard to which automobiles are subject. If it was an insurance on the automobile against theft, that, too, would be a recognized hazard to which the automobile is subject. So of injury by accident, the liability in each case would not be greater than the value of the automobile. Is not the relator doing more than placing insurance on automobiles? * * * We think it a strained construction of language to say that a contract of this sort is simply the placing of insurance on an automobile. The liability thus created is not limited by the value of the automobile. Instead of being property insurance, it makes a contract of an entirely different character from that authorized by the amendment."[6]

The Michigan court, making the same ruling as the Iowa court, refused to apply the rule of comity.

5. American Fidelity Co. v. Bleakley (1912), 157 Iowa 442, 138 N. W. 508.
6. American Automobile Insurance Co. v. Insurance Commissioner, 174 Mich. 295, 140 N. W. 557 (1913).

§ 769. Statutory regulations. (a) Operating car without license.

ONE OPERATING AN AUTOMOBILE ON A PUBLIC HIGHWAY WITHOUT A LICENSE, WHICH ACT IS A STATUTORY CRIME, IS NOT PRECLUDED BY PUBLIC POLICY FROM ENFORCING A POLICY INDEMNIFYING HIM AGAINST LIABILITY FOR BODILY INJURIES INFLICTED BY USE OF THE AUTOMOBILE.

In a leading Massachusetts case, the plaintiff sought to reach and apply, in a suit in equity, under the general laws of that state, money provided for in a contract of liability insurance between the defendants Hannah Pearlman and the Great Eastern Casualty Company.

The contract was for the term of one year from June 2, 1919, and by it the company agreed to indemnify Pearlman against loss from the liability imposed by law upon her on account of bodily injuries and resultant death accidentally suffered as a result of the ownership, maintenance, or use of her automobile. The policy expressly exempted the insurer from liability for injury or death suffered by the insured, or her employees, caused by her automobile while operated by any person in violation of law as to age, and, if there was no legal age limit, by anyone under the age of sixteen, or while engaged in any race or competitive speed test.

The injury was caused by the act of Mrs. Pearlman, while she was personally operating her duly registered automobile. She had, however, no license to operate a motor vehicle, and was unaccompanied by any licensed operator. Her only license had expired in the February prior to the issuance of the policy, but she believed it to be in force.

The casualty company contended that even though the unlawful conduct of the plaintiff was not forbidden in express terms, that it should not have been compelled to pay damages because of public policy.[7] Said the court: "In this commonwealth corporations may be organized to insure against loss or damage to and loss of use of motor vehicles, their fittings and contents, whether such vehicles are being operated or not, and wherever the same may be, * * *

7. Massachusetts Gen'l Laws, Chap. 90, secs. 10, 20.

and against loss or damage caused by * * * automobiles * * * to the property of another, for which loss or damage any person is liable.[8]

"The fact that Mrs. Pearlman operated her motor vehicle without a license, and that this act was a crime, did not render the vehicle a trespasser on the highway. In the trial of an action for damages to the vehicle, her wrongful act would have been evidence of negligence, but would not, as a matter of law, have barred a recovery. In the plaintiff's suit against her, it was admissible as evidence of her negligence, but it did not establish liabilty as a legal result. The fact that the number of punishable misdemeanors has multiplied many times in recent years, as the relations of men in business and society have grown complex with the increase of population, is a reason why the violation of a criminal statute of slight importance should not affect one's civil rights, except when this violation, viewed in reference to the element of criminality intended to be punished, has had a direct effect upon his cause of action. Our decisions seem to have been tending toward the adoption of such a rule.

"The unlawful act of Pearlman did not constitute a defense unless it was a direct and proximate cause contributing to the injury."

The court concluded its opinion in these words: "We are of opinion that it ought not to be held that a person who is guilty of the now-considered violation of the statute is forbidden, because of public policy, to recover under an insurance contract indemnifying against accident. So to hold would tend to defeat the object of such insurance, and would not tend to increase the welfare of the public."[9]

8. Massachusetts Gen'l Laws, Chap. 175, sec. 47.

9. McMahon v. Pearlman et al., 242 Mass. 367, 136 N. E. 154, 23 A. L. R. 1467 (1922).

§ 770. Statutory regulations. (b) Operating car by one under statutory age.

One of the leading cases on this question is the New York case of *Messersmith v. American Fidelity Company.*[10] In that case the plaintiff sued upon defendant's policy of insurance indemnifying him against liability for injuries accidentally suffered by anyone through the maintenance or use of his automobile. The defense was that in violation of Highway Law (Consol. Laws, chap. 25, sec. 282, subd. 2) the automobile was driven by an infant under the age of eighteen, who was not accompanied either by the owner or by a duly licensed chauffeur; that the automobile was so operated with plaintiff's knowledge and under his direction, and "that the accident was directly caused by the improper and negligent conduct of the said infant", while thus violating the law. Was indemnity under such circumstances consistent with public policy? The court, after concluding that the "legislature has said in so many words that insurance companies may indemnify against liability for loss and damage through the use and maintenance of automobiles,"[11] discussed the principle involved in these words:

"Here the contract on its face is perfectly legal. It does not purport to indemnify the plaintiff against damages growing out of the performance of an illegal act. * * * The plaintiff in this case, to make out his cause of action, was not required to prove any unlawful act. In fact, all of the material allegations of the defendant seeks to escape the liability which the policy places upon it by an independent affirmative defense to the effect that at the time of the accident the automobile was being driven by a boy under eighteen years of age in violation of law. 'An obligation will be enforced, though indirectly connected with an illegal transaction, if it is supported by an independent

10. Messersmith v. American Fidelity Company, 232 N. Y. 161, 133 N. E. 432, 19 A. L. R. 876.

11. Insurance Law, N. Y. (Consol. Laws, chap. 28), 70, Subds. 3, 9, 11.

consideration, so that the plaintiff does not require the aid of the illegal transaction to make out his case.'

"It seems to me that there is an attempt in this case to connect distinct and independent transactions, and to inject into the insurance contract, which was fair and legal in itself, the illegal feature of the other independent transaction. The independent legal contract of insurance, founded upon a good and valid consideration, was not made void by an incidental violation of the highway law. The violation of the statute was an entirely distinct and disconnected act. The issuing of the policy and the violation of the highway law were in no way connected. The issuing of the policy did not lead to the violation of the highway law in any way; it was not intended to aid or encourage such violation of the law."

"To restrict insurance to cases where liability is incurred with fault of the insured would reduce indemnity to a shadow. Neither in the statute nor in its application as shaped by long continued practice is there the token of an intention that indemnity shall be withheld from owners operating their own cars, and limited to those whose cars are run by servants. Liability of the owner, who is also the operator, can never be incurred without fault that is personal. Indeed, the statute has so covered the field that it can seldon, if ever, be incurred without fault that is also a crime. * * * The defendant * * * argues, however, that in this case the plaintiff's liability was the product, not of negligence, but of wilfulness. Undoubtedly the policy is to be confined to liability for injuries that may be described as accidental. Even if its terms did not so limit it, the fundamental principle that no one shall be permitted to take advantage of his own wrong would import the limitation. But the extension of the policy to this case is no departure from its restriction to injuries that are the product of accident or negligence. The plaintiff, in intrusting his car to a youth under eighteen, did not desire or intend that there should be an injury to travelers. The act of so intrusting it was wilful, but not the ensuing con-

duct of the custodian, through which injury resulted. Indeed, the violation of the statute would have been the same, though the driver's age had been unknown. What was wilful was not actionable, except as it became so in the sequel, through what was unintended or fortuitous." [12]

§ 771. Statutory regulations. (c) Policy conditions—Validity.

A provision of a policy against loss of an automobile that liability shall not attach if the automobile is at the time of loss being driven by a person not authorized by law, or contrary to law, is not unreasonable or against public policy, and therefore no recovery can be had if at the time of loss the machine is not properly registered, or is driven by an unlicensed chauffeur.[13]

§ 772. Liability for criminal negligence.

In a leading English case on this question, the insured while driving his automobile at an excessive rate of speed, injured two persons and killed another. His conduct constituted criminal negligence, but nevertheless the insurer was held liable on the policy. The court said: "Speaking generally, it is true to say that it is against public policy to indemnify a man against the consequence of a crime which he knowingly commits, and in the word 'crime' I include the breach of any statutory duty which renders a man liable to fine or imprisonment. In motor accidents where the assured is the driver of the motor car I suppose that in the great majority of cases the accident is due to the breach by the driver of some enactment. Many of these accidents are due to driving at excessive speed. That was the case here. Driving at an excessive speed—exceeding the speed limit—is a breach of an enactment which subjects the person guilty of it to fine or imprisonment; and if

12. Messersmith v. American Fidelity Company, 232 N. Y. 161, 133 N. E. 432, 19 A. L. R. 876 (1922); See Hossley v. Union Indemnity Co. of New York, 137 Miss. 537, 102 So. 561 (1925)

13. Standard Automobile Insurance Ass'n v. Neal, 199 Ky, 699, 251 S. W. 966, 35 A. L. R. 1468 (1923).

the ordinary law were to be applied to cases of this kind it would be a defense to say that the assured, although he did not intend to commit manslaughter, committed it by violating an enactment—namely, by driving in excess of the speed limit, or by driving to the danger of the public. But it is notorious that that defense is never raised. Lord Halsbury said that the law is not always logical, and everyone concerned with the administration of the law knows this. If the law is not logical, public policy is even less logical, for, by common consent, these third-party indemnity insurances have been treated as valid and effective.

"There can be no doubt that if none of the three persons who were knocked down and had been killed makes no difference for this purpose. The policy is against claims for accidents due to negligence, because without negligence there is no liability. Precisely the same negligence which injured the two persons killed the third, but to hold that there is any difference in the liability to indemnify would be to hold that the indemnity depends upon the nature and result of the injury sustained by the person who is knocked down, or, to put it in another way, that it depends in some degree upon the amount of the assured's negligence. That will not do, because there is very often quite as much negligence in knocking down a person who is not killed as there is in knocking down a person who is killed, and whose death makes the person who has knocked him down and killed him guilty of manslaughter. The fact that one of the three persons was killed is, as I have said, really immaterial for the purposes of this case; it was the incident of the accident, or the accident of the accident,—an accident due, it is true, to gross negligence; but the policy is an insurance against negligence whether slight or great, and it seems to me that it covers this case. It must, of course, be clearly understood that if this occurrence had been due to an intentional act on the part of the plaintiff, the policy would not protect him. If a man driving a motor car at an excessive speed intentionally runs into and kills a man, the result is not manslaughter, but murder. Manslaughter is the result of

an accident, and murder is not; and it is against accident, and accident only, that this policy insured. The point, as I have said, is a novel one, but for the reasons I have given it fails, and the plaintiff is entitled to the declaration asked for."[14]

§ 773. Liability for criminal negligence. Where negligent conduct constituted criminal offense—Distinguished.

But in a Canadian case, where the policy indemnified the insured against loss by reason of liability imposed by law for damages on account of personal injuries accidentally sustained, and the insured, while operating his automobile at an unlawful rate of speed and in a drunken condition, killed a pedestrian, the court held that the insurer was not liable. Commenting on the English case of *Tinline v. White Cross Ins. Co.*, heretofore referred to, the Canadian court said: "*Tinline v. White Cross Ins. Co.* (Eng.) if rightly decided, which may be open to question, is, I think, distinguishable. The *ratio decidendi*, as I understand it, was that the plaintiff was insured against accident, that negligence must, therefore, have been contemplated, as without negligence there could be no liability (i. e., to the injured), that the defense depended on the degree of negligence, that that was impossible—and that although in the result the person injured had died as the result of his injuries. I gather from what was said that there was no legislation similar to that in 285 of the Criminal Code, and therefore the negligence of the plaintiff did not constitute a crime, although in the result it was a criminal offense—manslaughter—which was committed. In the case at bar, the appellant's negligence, apart from it resulting in the death of the injured man, was a crime; and according to the cases to which I have referred, the appellant cannot maintain an action to indemnify him against the injury caused by that act."[15]

14. Tinline v. White Cross Ins. Ass'n, 3 K. B. (Eng.) 327, 26 Com. Cas. 347, 37 Times L. R. 733, 90 L. J. K. B. N. S. 118, 125 L. T. N. S. 632 (1921).

15. O'Hearn v. Yorkshire Ins. Co. (Ont.), 67 D. L. R. 735 (1921).

§ 774. Indemnity bond insuring against violation of city ordinance.

An indemnity policy which insures a taxicab company against loss by the violation of a city ordinance by its employees is not void on the ground of public policy. The rule is that, although a contract indemnifying another against consequences arising from wilful violation of a statute, or from the commission of a crime generally, committed by the assured himself is void, but on the other hand, a contract to insure against the consequences of such acts committed by one's servants and employees, if such acts are not directed by or participated in by the assured, are valid.[16]

§ 775. Negligence.

A liability policy which protects the assured operating an automobile from liability for his negligence or that of his agents or servants, is not illegal and void as against public policy.[17]

§ 776. Insurer conducting defense.

The court, in a Pennsylvania case, refused to restrain an insurance company which had insured an automobile owner against liability for accidents from conducting the defense. The opinion of the court, in part, reads: "There was a time when all insurance, and especially of life, was looked upon with suspicion and disfavor, but it was only because regarded as a species of wagering contract. That time has long gone by. And with the intelligent study of political economy bringing the recognition of the fact that even the most apparently disconnected and sporadic occurrences are subject to at least an approximate law of averages, the insurance against loss from any such occurrence has been recognized as a legitimate subject of protection to the individual by a guaranty of indemnity from some party under-

16. Taxicab Motor Co. v. Pacific Coast Casualty Co. of San Francisco, 73 Wash. 631, 132 Pac. 393 (1913).

17. Ford v. Stevens Motor Car Co., 203 Mo. App. 669, 220 S. W. 980 (1920).

taking to distribute and divide the loss among a number of others for a premium giving them a prospect of profit. There is nothing in this case that even remotely discloses the taint of maintenance, even at common law, much less of the principle of maintenance as administered at the present day with a clearly defined limitation to cases of actually malicious, dangerous, or illegal intermeddling with other parties' litigation." [18]

The rule enunciated in this case is generally applied. It needs no citation of authorities.

B. INDEMNITY AND LIABILITY INSURANCE.

§ 777. In general.

Automobile public liability and property damage insurance policies are of two kinds, the "liability" contract, which obligates the insurer to pay the loss without first requiring that the assured do so, and the "indemnity" contract, which obligates the insurer to reimburse only after the assured has paid the debt to the injured claimant.

§ 778. Indemnity and liability insurance distinguished.

The difference between a contract of indemnity and one to pay legal liabilities is, that upon the former an action cannot be brought and a recovery had until the liability is discharged; but, upon the latter, the cause of action is complete when the liability attaches.[19]

LIABILITY POLICY.

UNDER AUTOMOBILE LIABILITY POLICY INDEMNIFYING ASSURED AGAINST LOSS FROM LIABILITY FOR INJURIES AND CONTAINING NO CLAUSE PROHIBITING ACTION ON POLICY BEFORE PAYMENT OF JUDGMENT, CAUSE OF ACTION IS COMPLETE WHEN LIABILITY FOR LOSS ATTACHES: THE AMOUNT DUE BEING FIXED BY SETTLEMENT

18. Gould v. Brock, 221 Pa. 38, 69 Atl. 1122 (1908).

19. American Employers' Liability Ins. Co. v. Fordyce, 62 Ark. 562, 36 S. W. 1051, 54 Am. St. Rep. 305.

WITH INJURED PERSON WITH THE INSURANCE COMPANY'S CONSENT OR BY JUDGMENT AGAINST INSURED.

§ 779. Liability policy. Rule of construction.

Automobile liability policy which reserves to the insurer full and complete control over adjustment of all claims that might arise under the policy and expressly obligates the insurer to defend any suit brought against assured, whether groundless or not, and insuring against loss and expense, is a contract to pay liability, and it authorizes recovery as soon as liability attaches to assured, and before it has been discharged.[20]

§ 780. Illustrations.

The contract has been held to be one of liability, and the insurer is obligated to pay the loss without obligation on the part of the assured, where the policy provided: (a) "against actual loss sustained by subscriber on account of legal liability imposed upon him (assured),"[21]

20. Elliott v. Belt Auto. Ass'n, 87 Fla. 545, 100 So. 797 (1924); Nolan v. Illinois Automobile Insurance Exchange, 219 Ill. App. 531 (1920); Bradley v. Illinois Automobile Insurance Exchange, 227 Ill. App. 572, 17 Ill. Law. Rev. App. Ct. Dig. 176 (1922); Lorando v. Gethro, 228 Mass. 181, 117 N. E. 185 (1917), 1 A. L. R. 1374; Lunt v. Aetna Life Ins. Co., 253 Mass. 610, 149 N. E. 660 (1925); Barney v. Preferred Automobile Ins. Exch., 240 Mich. 199, 215 N. W. 372 (1927); Griffin v. General Casualty & Surety Co., 231 Mich. 642, 204 N. W. 727 (1925); Patterson v. Adan, 119 Minn. 308, 138 N. W. 281, 48 L. R. A. (N. S.) 184 (1912); Reilly v. Linden, 151 Minn. 1, 186 N. W. 121 (1922); Klotzbach v. Bull Dog Fire Insurance Ass'n (Mo. App.), 267 S. W. 39 (1924); Goerss v. Indemnity Co. of America (Mo. App.), 3 S. W. (2nd) 272, Powers v. Wilson, 139 Minn. 309, 166 N. W. 401 (1918); Capelle v. United States Fidelity & Guaranty Co., 80 N. H. 481, 120 Atl. 556 (1925); Weiss v. New Jersey Fidelity & Plate Glass Ins. Co., 228 N. Y. S. 314, 131 Misc. 836; Stacey v. Fidelity & Casualty Co. of New York, 21 Ohio App. 70, 152 N. E. 794, aff'g 114 Ohio 633, 151 N. E. 718 (1926); Wehrhahn v. Dearborn Casualty Underwriters of Chicago (Mo. App.), 1 S. W. (2d) 242; Royal Indemnity Co. v. Schwarts (Tex. Civ. App.), 172 S. W. 581 (1914); Fentress v. Rutledge, 140 Va. 685, 125 S. E. 668 (1924); Landaker v. Anderson, 145 Wash. 660, 261 Pac. 388 (1927); Fenton v. Poston, 114 Wash. 217, 195 Pac. 31 (1921); Ducommun v. Strong, 193 Wis. 179, 212 N. W. 289, re-hearing denied, 214 N. W. 616 (1927).

21. Elliott v. Belt Automobile Ass'n, 87 Fla. 545, 100 So. 797 (1924).

(b) "against loss or expense arising or resulting from lawful claims upon the assured for damages;"[22] (c) "pay all judgments;"[23] (d) insuring against "loss;"[24] (e) for payment of loss and judgment;[25] (f) pay loss "imposed by law;"[26] (g) "against loss arising out of such liability;"[27] (h) insuring against "liabilities;"[28] (i) "indemnify the assured * * * against loss arising or resulting from claims upon the assured for damages;"[29] (j) "against loss or expense arising or resulting from claims upon the assured for damages."[30]

§ 781. Insurer's liability subject to conditions of policy.

Even though the policy is construed as one of liability rather than indemnity, the liability of the insurer is only absolute in the sense that payment of loss does not depend upon the satisfaction by the assured of a final judgment against him for the loss occasioned by the casualty under the policy.[31]

§ 782. Injured claimant's right of action.

When the injured claimant becomes a judgment creditor of the assured, he has a direct right of action against the insurer, but provisions of the liability policy pertaining

22. Nolan v. Illinois Auto. Ins. Exchange, 219 Ill. App. 531 (1920).

23. Klotzbach v. Bulldog Automobile Insurance Ass'n (Mo. App.), 267 S. W. 39 (1924).

24. Goerss v. Indemnity Co. of America (Mo. App.), 3 S. W. (2d) 272; Wehrhahn v. Ft. Dearborn Casualty Underwriters of Chicago, Ill. (Mo. App.), 1 S. W. (2d) 242; Landaker v. Anderson, 145 Wash. 660, 261 Pac. 388 (1927).

25. Barney v. Preferred Automobile Ins. Exch., 240 Mich. 199, 215 N. W. 372 (1927).

26. Fenton v. Poston, 114 Wash. 217, 195 Pac. 31 (1921).

27. Fentress v. Rutledge, 140 Va. 685, 125 S. E. 668 (1924).

28. Ducommun v. Strong. 193 Wis. 179, 212 N. W. 289, re-hearing denied, 214 N. W. 616.

29. Transylvania Casualty Ins. Co. v. Williams, 209 Ky. 626, 273 S. W. 536 (1925).

30. United States Fidelity & Guaranty Co. v. Williams, 148 Md. 289, 129 Atl. 660 (1925).

31. Stacey v. Fidelity & Casualty Co. of New York, 114 Ohio 633, 151 N. E. 718 (1926).

to notice of accident, or insurer's right to defend on account thereof, and all other matters arising under the policy are likewise binding upon such judgment creditor.[32]

§ 783. Garnishment.

Injured claimant, who is a judgment creditor, has a right to institute garnishment proceedings against the insurer under liability policy, and recover judgment against the insurance company.[33]

§ 784. Estoppel.

Where the policy was somewhat ambiguous as to whether it was intended as an indemnity or liability policy and the insurer under the terms and conditions of the policy assumed exclusive responsibility for conducting the assured's defense, it could not thereafter deny liability on the ground that the policy was one for indemnity and the assured had not paid the judgment.[34]

NO ACTION CLAUSE.

A PROVISION IN THE POLICY THAT NO ACTION SHALL LIE AGAINST THE COMPANY "UNLESS IT SHALL BE BROUGHT BY THE ASSURED FOR LOSS OR EXPENSE ACTUALLY SUSTAINED AND PAID IN MONEY BY HIM AFTER TRIAL OF THE ISSUE", BY THE WEIGHT OF AUTHORITY, IS A CONTRACT OF INDEMNITY FOR THE BENEFIT OF THE ASSURED; AND THERE IS NO RIGHT OF ACTION THEREON AGAINST THE INSURANCE COMPANY UNTIL THE ASSURED SUSTAINS A LOSS BY THE PAYMENT OF THE LIABILITY.

THAT AN INDEMNITY INSURER ASSUMES THE DEFENSE OF AN ACTION AGAINST THE INSURED DOES NOT RENDER IT LIABILE TO SATISFY THE JUDGMENT WHERE THE POLICY MAKES IT LIABLE FOR MONEY PAID BY ASSURED IN OR UPON A FINAL JUDGMENT AGAINST HIM.

32. Stacey v. Fidelity & Casualty Co. of New York, 114 Ohio 633, 151 N. E. 718 (1926).

33. Transylvania Casualty Insurance Co. v. Williams, 209 Ky. 626, 273 S. W. 536 (1925); London & Lancashire Indemnity Co. v. Cosgriff, 144 Md. 660, 125 Atl. 529 (1924); Goerss v. Indemnity Co. of America (Mo. App.), 3 S. W. (2d) 272.

34. Griffin v. General Casualty & Surety Co., 231 Mich. 642, 204 N. W. 727 (1925).

TO HOLD AN INSURANCE COMPANY LIABLE AS GARNISHEE UPON A JUDGMENT AGAINST THE INSURED, A PRESENT FIXED LIABILITY UPON THE GARNISHEE TO PAY THE ASSURED FOR THE LOSS INSURED AGAINST MUST BE SHOWN.

AN UNDERTAKING TO REMIBURSE INSURED ONLY FOR THE MONEY HE SHOULD HAVE EXPENDED IN PAYMENT OF A JUDGMENT AGANIST HIM IS EFFECTED BY A POLICY UNDERTAKING TO INDEMNITY HIM AGAINST LOSS ARISING OR RESULTING FROM CLAIMS UPON HIM FOR DAMAGES, BUT PROVIDING THAT NO ACTION SHALL BE BROUGHT AGAINST THE INSURER UNLESS FOR LOSS THAT ASSURED HAS ACTUALLY SUSTAINED BY PAYMENT IN MONEY OF A FINAL JUDGMENT.

§ 785. "No action" clause. Indemnity policy. (a) In general.

A policy by which insurer agrees to indemnify assured against loss from claims for personal injuries, and which provides that if action is brought against assured on a claim covered by the policy he shall notify insurer, and it will defend in the name and on behalf of assured, and that no action shall lie against insurer to recover for any loss under the policy, unless brought by assured for loss actually sustained and paid in money by him after trial, indemnifies only against loss actually sustained and paid by assured in money, and not against liability.

§ 786. "No action" clause. Indemnity policy. (b) General rule.

The provision oftentimes contained in the automobile indemnity policy that "no action shall lie against the company to recover for any loss * * * or expense under this policy unless is shall be brought by the assured for loss * * * or expense actually sustained and paid in money by him after actual trial of the issue," or words to that effect, by the weight of authority, creates an obligation of indemnity as distinguished from liability, and, under such conditions, the insurance company is not liable to the claimant unless and until the liability is established by a judgment and that judgment is paid by the assured.[35] Such is

35. Shea v. United States Fidelity & Guaranty Co., 98 Conn. 447, 120 Atl. 286 (1923); Kansas Free Fair Asso. v. Georgia Casualty Co., 107 Kan. 109, 190 Pac. 592 (1920); Boling v. Ashbridge, 111 Okla. 66, 238 Pac. 421 (1925); Teters

the rule in a great many liability insurance cases, other than automobile, where the policies contained the "no action" clause.[36]

§ 787. "No action" clause. Indemnity policy. (c) Rule applied.

A leading automobile liability case on this question is

v. Gass, 156 Tenn. 127, 299 S. W. 788; American Auto. Ins. Co. v. Cone (Tex. Civ. App.), 257 S. W. 961 (1923); Combs v. Hunt, 140 Va. 627, 125 S. E. 661, 37 A. L. R. 621 (1924); Landaker v. Anderson, 145 Wash. 660, 261 Pac. 388 (1927); Luger v. Windell, 116 Wash. 375, 199 Pac. 760 (1921). 37 A. L. R. 641; Glatz v. General Accident, Fire & Life Assur. Corp. Ltd., 175 Wis. 42, 183 N. W. 683 (1921).

36. Goodman v. Georgia L. Ins. Co., 189 Ala. 130, 66 So. 649 (1914); McBride v. Aetna Life Ins. Co., 126 Ark. 528, 191 S. W. 5; Hebojoff v. Globe Indem. Co., 35 Cal. App. 390, 169 Pac. 1048; Schambs v. Fidelity & Casualty Co., 259 Fed. 55, 169 C. C. A. 55, 6 A. L. R. 1231; Allen v. Aetna Life Insurance Co., 76 C. C. A. 265, 145 Fed. 881, 7 L. R. A. (N. S.) 958; Shea v. United States Fidelity & G. Co., 98 Conn. 477, 120 Atl. 286 (1923); Allen v. Gilman, McN. & Co. (C. C.), 137 Fed. 136; Illinois Tunnel Co. v. General Acci. F. & L. Ins. Co., 219 Ill. App. 251 (1920); Cushman v. Carbondale Fuel Co., 122 Iowa 656, 98 N. W. 509; Carter v. Aetna Ins. Co., 76 Kan. 275, 91 Pac. 178, 11 L. R. A. (N. S.) 1155; Kansas Free Air Ass'n v. Georgia Cas. Co., 107 Kan. 109, 190 Pac. 592; Emerson v. Western Auto. Indem. Ass'n, 105 Kan. 242, 182 Pac. 647; Fidelity & C. Co. v. Martin, 163 Ky. 12, L. R. A. 1917F, 924, 173 S. W. 307 (1919); Poe v. Philadelphia Casualty Co., 118 Md. 347, 84 Atl. 476 (1912); London & L. Indem. Co. v. Cosgriff, 144 Md. 660, 125 Atl. 529 (1924); Frye v. Bath Gas, etc. Co., 97 Me. 241, 54 Atl. 395, 59 L. R. A. 444, 94 Am. St. Rep. 500; Lorando v. Gethro, 228 Mass. 181, 117 N. E. 185, 1 A. L. R. 1374; Connolly v. Bolster, 187 Mass. 266, 72 N. E. 981; O'Connell v. N. Y. N. H. & H. R. R., 187 Mass. 272, 72 N. E. 979; Brain v. Atkins, 181 Mass. 240, 63 N. E. 414, 92 Am. St. Rep. 411, 57 L. R. A. 791; Conqueror Z. & L. Co. v. Aetna Life Ins. Co., 152 Mo. App. 332, 133 S. W. 156; Hoagland Wagon Co. v. London Guar. & Acc. Co., 201 Mo. App. 490, 212 S. W. 393; Newton v. Seeley, 177 N. C. 528, 99 S. E. 347; Travellers' Ins. Co. v. Mosses, 63 N. J. Eq. 260, 49 Atl. 720, 92 Am. St. Rep. 663; Appel v. People's Surety Co., 148 App. Div. 70, 132 N. Y. S. 200; Curtis & Gardside Co. v. Aetna Life Ins., 58 Okla. 470, 160 Pac. 465; Maryland Cas. Co. v. Peppard, 53 Okla. 515, 157 Pac. 106 L. R. A. 1916E, 597; Riner v. Southwestern Surety Ins. Co., 85 Or. 293, 165 Pac. 684, 166 Pac. 952; Finley v. U. S. Cas. Co., 113 Tenn. 592, 83 S. W. 2, 3 Ann. Cas. 962; Cayard v. Roberston, etc., 123 Tenn. 382, 131 S. W. 864, 30 L. R. A. (N. S.) 1224; Texas Short Line R. Co. v. Waymire (Tex. Civ. App.), 89 S. W. 452; Combs v. Hunt, 140 Va. 627, 125 S. E. 661, 37 A. L. R. 621 (1924); Ford v. Aetna L. Ins. Co. (1912), 70 Wash. 29, 126 Pac. 69; Glatz v. General Acci. F. & L. Assur. Corp. (1921), 175 Wis. 42, 183 N. W. 683; Eberlein v. Fidel. & Dep. Co., 164 Wis. 242, 159 N. W. 553.

the Virginia case of *Combs v. Hunt*. Quoting from the opinion of the court: "The use of the automobile has become universal in this country, and automobile accidents occur so frequently that they may be said, like the poor, to be always with us. Naturally, automobile owners and users have sought protection by insurance against damages they may have to pay. Doubtless the policies issued for this purpose vary in their terms and conditions, and, as is the case with other contracts, the meaning of each policy must be determined by the language which the parties have chosen to express their agreement. It is well settled, however, that in considering an insurance contract, and in seeking to ascertain the intent of the parties, the court will take cognizance of the fact that the policy is prepared by the insurance company and is apt to contain stipulations and conditions, at times complicated and of doubtful meaning, placed in the contract for the protection of the company, and therefore the court will in cases of ambiguity lean to a construction most favorable to the assured; still, primarily an insurance contract must be construed in accordance with its terms; its plain meaning must be given effect; courts cannot make contracts for the parties.

"The policy in the instant case is on its face an indemnity contract, having for its purpose to indemnify the assured against loss arising from claims made against him for damages to others injured by him while operating his car, without further specific definition, in the opening statement of the policy showing its general purpose, of the character of the loss insured against. Condition D of the policy, the 'no action' clause, contains in unmistakable terms an exact statement of the loss insured against. All portions of the policy must be considered in its construction. The opening clause and condition D, read together, leave no doubt as to the clearly expressed undertaking of the company; that is, to reimburse the assured for the money he should have expended in payment of a judgment against

him."[37] But the rule was distinguished by the supreme court of the state of Virginia, in *Fentress v. Rutledge and Royal Indemnity Company,* shortly after the decision of the same court in *Combs v. Hunt.* The *Fentress* case emphasizes the importance of the "no action" clause in the policy, for the Virginia court held in the *Fentress* case, where the policy did not contain the "no action" clause that the insurer, was liable—the court, in effect holding with many others, that the "no action" clause in such policies of accident insurance determines whether the contract is one of liability or indemnity. In the *Fentress* case, the policy on its face was designated "Automobile public liability policy." The company in the contracting clause, in consideration of the premium, agreed with the insured that if any person shall sustain bodily injuries by reason of the ownership or use of insured's automobile, for which injuries insured is liable for damages, then the company would indemnify the insured, "against loss arising out of such liability." Said the court: "It is well settled that under such an agreement, the cause of action against the company is complete when the liability for such loss attaches, and the amount due under the policy is to be fixed in a settlement with the injured person, made with the consent of the company, or by a judgment against the insured."[38]

Another recent case on this question was determined by the supreme court of the state of Connecticut. The judgment creditor brought suit on the policy against the judgment debtor and the company, the insurer was garnisheed. The "no action" clause was condition G. Construing the policy and considering the right of the insurer to defend the act, the court said: "To defend any suit brought against the assured cannot be construed to mean to defend successfully such suit, unless there be written into this provision of the policy the word 'successfully' or its

37. Combs v. Hunt, 140 Va. 627, 125 S. E. 661, 37 A. L. R. 621 (1924).
38. Fentress v. Rutledge, 140 Va. 685, 125 S. E. 668 (1925).

equivalent, and this would make a new contract, for the parties, which is beyond our power. For the same reason we are without authority to construe condition G to apply merely as a condition precedent to cases where the insurer does not defend the suit against the assured.

"Construing this policy as its language compels, we hold that the agreement to defend does not mean to defend successfully; that the contract is one of indemnity against loss and not against liability; that the injured person has no legal or equitable ground of recovery where there is nothing due the assured under the terms and conditions of the policy; that condition G requires payment of the judgment against the insured before liability arises against the insurer, and is a condition precedent to recovery; that where garnishee process of attachment is available, that method, and not a claim of the right in equity, is the method by which the injured person should attempt to secure whatever sum may be due the assured under the policy; that an adjudication of bankruptcy against the insured during the pendency of such an action does not create rights in the injured person against the insurer." [39]

§ 788. "No action" clause. Indemnity policy. (d) Absence of "no action" clause.

It has been held in Maryland where the policy was to "indemnify * * * the assured against loss from the liability imposed by law upon the assured for damages" that the absence of a "no action" clause does not give rise to a presumption that the assured has a right of action against the insurer without paying judgment of injured party or otherwise meeting obligation imposed by law.[40]

§ 789. "No action" clause. Indemnity policy. (e) Garnishment.

The injured person, who is a judgment creditor of the

39. Shea v. United States Fidelity & Guaranty Co., 98 Conn. 447, 120 Atl. 286 (1923).

40. London & Lancashire Indemnity Co. v. Cosgriff, 144 Md. 660, 125 Atl. 529 (1924).

assured, by weight of authority, has no right of action against the insurer to recover the amount of his judgment or to the extent of the face amount of the policy where the policy contains a "no action" clause.[41]

§ 790. "No action" clause. Indemnity policy. (f) Bankruptcy or insolvency.

The majority rule is even applied in case of the bankruptcy or insolvency of the assured, where the policy contains the "no action" clause and suit is defended by the insurer, provided the policy contains no condition to the contrary. The injured claimant, who is a judgment creditor, has no right to recovery from the insurer, unless payment is first made by the assured.[42] This is the rule in many jurisdictions in automobile liability insurance cases and liability insurance cases other than automobile under policies containing the "no action" clause.[43]

But it has been held that if the insurer by its wrongful conduct unjustifiably influenced the assured to file bankruptcy proceedings and that, otherwise, payment would probably have been made, it would be estopped from deny-

41. London & Lancashire Indemnity Co. v. Cosgriff, 144 Md. 660, 125 Atl. 529 (1924); United States Fidelity & Guaranty Co. v. Williams, 148 Md. 289, 129 Atl. 660 (1925); American Automobile Insurance Co. v. Cone (Tex. Civ. App.), 257 S. W. 961 (1923); Combs v. Hunt, 140 Va. 627, 125 S. E. 661, 37 A. L. R. 621 (1924); Luger v. Windell, 116 Wash. 375, 199 Pac. 760 (1921); Glatz v. General Accident, Fire & Life Assurance Corp., Ltd., 175 Wis. 42, 183 N. W. 683 (1921).

42. Goodman v. Georgia Life Insurance Co., 189 Ala. 130, 66 So. 649 (1914); Emerson v. Western Automobile Indemnity Ass'n, 105 Kan. 242, 182 Pac. 647 (1919).

43. Transylvania Casualty Ins. Co. v. Williams, 209 Ky. 626, 273 S. W. 536 (1925); American Automobile Ins. Co. v. Cone (Tex. Civ. App.), 257 S. W. 961 (1923); Glatz v. General Accident, Fire & Life Assurance Corp. Ltd., 175 Wis. 42, 183 N. W. 683 (1921); Fidelity & C. Co. v. Martin, 163 Ky. 12, 173 S. W. 307, L. R. A. 1917F, 924; Carter v. Aetna Life Ins. Co., 76 Kan. 275, 11 L. R. A. (N. S.) 1155 (1907); Cayard v. Robertson, 123 Tenn. 382, 131 S. W. 864, 30 L. R. A. (N. S.) 1224 (1924); Ford v. Aetna Life Insurance Co., 70 Wash. 29, 126 Pac. 69 (1912).

ing liability on the ground that the judgment against the assured had not been paid.[44]

§ 791. "No action" clause. Indemnity policy. (g) In equity—receivership.

Where the automobile policy indemnifies the insured for loss sustained from injuries received by third persons by reason of the operating of insured's automobile, and provides that no action shall lie against the insurer unless it shall be brought by the insured for loss or expense actually sustained and paid in money after actual trial of the issue, the insured claimant as a judgment creditor of the insured has no right of recovery against the insurer in a court of equity even though the insured is in the hands of a receiver; for the intention of the parties to the contract as shown by the policy is that the insurer is liable only for such obligations as the insured has actually paid.[45]

§ 792. "No action" clause. Indemnity policy. (h) Paying judgment with promissory note, etc.

WHERE THE ASSURED SATISFIES THE JUDGMENT OF THE INJURED CLAIMANT BY GIVING HIS PROMISSORY NOTE FOR THE AMOUNT, AND SATISFACTION OF JUDGMENT IS ENTERED OF RECORD, THERE IS SUCH A SUBSTANTIAL COMPLIANCE WITH THE "NO ACTION" PROVISION OF THE POLICY THAT THE INSURER IS THEN LIABLE FOR THE AMOUNT OF THE JUDGMENT.

BUT IT HAS BEEN HELD THAT UNDER AN ORDINARY INDEMNITY POLICY WHICH PROVIDED THAT NO ACTION WOULD LIE EXCEPT FOR LOSS ACTUALLY SUSTAINED AND "PAID IN MONEY", THE GIVING OF A PROMISSORY NOTE DOES NOT SATISFY THE TERMS OF THE POLICY, AND THE INSURER IS NOT LIABLE.

The general rule is under an automobile liability policy containing the usual stipulations as to the right of the insurer to notice of and defense of the action and also embracing the "no action" clause, that where the insurer has such notice and defends the action, and judgment is

44. Emerson v. Western Automobile Indemnity Ass'n, 105 Kan. 242, 182 Pac. 647 (1919).

45. Goodman v. Georgia Life Ins. Co., 189 Ala. 130, 66 So. 649 (1914).

entered against the assured, that where the assured gives his promissory note in payment of the judgment and it is released of record, there is such a substantial compliance with the provision of the policy as to payment of the claim or judgment that the insurer is then liable.[46]

In a Washington case, the policy provided that no action should lie against the company for any loss under the policy unless it should be brought by the assured to reimburse him for loss actually sustained and paid by him in satisfaction of a final judgment, within ninety days from the date of such judgment. The judgment was paid by the execution of an unsecured promissory note. The terms of payment and the satisfaction of the judgment were reported to the probate court administering the decedent's estate and were sanctioned and approved by the court before settlement was made. The court held that under the evidence the note was given in good faith, and if there was a substantial compliance with the policy the insurer was liable.[47]

This question was also presented to the Michigan court, and although at the time action was brought, the note had not been paid, the insurer was held liable. The position taken by the Michigan court, however, was that because of the fact that the insurer unsuccessfully defended the action against the assured, it was estopped to thereafter claim that it was not liable on the policy.[48]

Where, in a Missouri case, there was a joint judgment against the assured and his employer, and the evidence was that the employer loaned to the assured the amount of money necessary to satisfy the judgment without any promise not to hold him liable on his promissory note, which

46. Kansas Free Fair Ass'n v. Georgia Cas. Co., 107 Kan. 109, 190 Pac. 592; Griffin v. General Casualty & Surety Co., 231 Mich. 642, 204 N. W. 727 (1925); St. Louis Screw Co. v. Mastin (Mo. App.), 253 S. W. 96 (1923); Taxicab Motor Co. v. Pacific Coast Casualty Co. of San Francisco, 73 Wash. 631, 132 Pac. 393 (1913).

47. Taxicab Motor Co. v. Pacific Coast Casualty Co. of San Francisco, 73 Wash. 631, 132 Pac. 393 (1913).

48. Griffin v. General Casualty & Surety Co., 231 Mich. 642, 204 N. W. 727 (1925).

was given as security for the loan, the court held that the judgment was actually paid by the assured regardless of whether he or the agent for the employer actually delivered the money to the judgment creditor, and that the insurer was liable.[49]

The Missouri court, however, has held that the giving of promissory notes secured by deeds of trust by the assured is not a payment entitling the assured to recover where the by-laws of the company provide for a different form of payment, and the policy sued on provides that the by-laws shall be considered as a part of the contract. The by-laws provided that action against the insurer could only be brought under the policy by the assured personally, but that no action would lie except "for loss or expense actually paid in money by said member in satisfaction of such final judgment."[50]

This question presented itself to the courts in accident indemnity policies generally, before the automobile liability policy came into use, and the law had been quite well established. A well considered Kentucky case presents the legal argument in favor of the rule, and in part, reads: "But the whole argument of appellant rests upon the claim that the mere giving of the notes did not amount to a loss actually sustained, for the reason that the maker of the notes and the guarantor might never be called upon to make payment, might become insolvent, that there is no certainty they will ever be paid, and, if not paid, there is no loss actually sustained. This means that the party assured, no matter what his financial condition might be, would be compelled to raise the actual cash within sixty days and pay it to the judgment creditor, or be foreclosed from enforcing the indemnity against the company. If the position is sound, the money could not be raised by borrowing at a bank, or at any other place, upon promissory notes secured

49. St. Louis Screw Co. v. Mastin (Mo. App.), 253 S. W. 96 (1923).

50. State ex rel. Western Automobile Insurance Co. v. Trimble, 297 Mo. 659, 249 S. W. 902 (1923); See Neff v. Republic Casualty Co., 8 Pa. Dist. & Co. 183 (1926).

either by a signer or by property, because, before the notes became due, the property might become worthless, deteriorate in value, or the parties might become insolvent, and no actual payment ever be made, hence no loss. Fairly construed, the language means simply that the judgment must be paid and satisfied within sixty days from date of its entry, and, when such judgment is paid or satisfied, the loss is actually sustained. Of what consequence is it to the company whether respondent has on hand immediate cash to pay the judgment, or whether the judgment debtor is compelled to borrow that amount on the most favorable terms, or whether he makes the payment and secures the satisfaction by the execution of promissory notes running direct to the judgment creditor? Logically there is no difference in the method, and in either case it amounts to a payment and satisfaction of the judgment. If the assured accomplished the satisfaction and payment of the judgment by executing and delivering the promissory notes above described, the good faith of the transaction was hardly open to question, even though it gave the assured the advantage of collecting from appellant company the amount of insurance before the notes came due." [51]

The rule seems to be generally recognized.[52]

But it has been held in a California case where the provision of the accident indemnity policy is that no action will lie except for a loss actually sustained and "paid in money," the giving of a promissory note does not satisfy the terms of the policy, and the insurer does not thereupon become liable. The opinion of the court reads:

"The policy of insurance here exhibited is one of indem-

51. Kennedy v. Fidelity & C. Co., 100 Minn. 1, 110 N. W. 97, 117 Am. St. Rep. 658, 9 L. R. A. (N. S.) 478.

52. Wilson v. Smith, 23 Iowa 252; Gardner v. Cooper, 9 Kan. App. 587, 58 Pac. 230, 60 Pac. 540; Flannagan v. Forest, 94 Ga. 685, 21 S. E. 712; Seattle & S. F. R. R. & Nav. Co. v. Maryland Casualty Co., 50 Wash. 44, 96 Pac. 509, 18 L. R. A. (N. S.) 121; Bausman v. Credit Guarantee Co., 47 Minn. 377, 50 N. W. 496; Lee v. Clark, 1 Hill 56; Pasewalk v. Bollman, 29 Neb. 519, 26 Am. St. Rep. 399, 45 N. W. 780.

nity as distinguished from one insuring against liability; that is, the insurer here agrees to indemnify for loss actually suffered by the assured, and not to indemnify for liability incurred which liability would have been complete upon the entry of judgment against the policy holder. In construing the term of the contract to which our attention is now directed, the reason for its insertion in the agreement and the purpose and intent to be served should be examined. It may reasonably be inferred that the insurer, recognizing the law that the assured under an ordinary indemnity agreement might satisfy a claimant's judgment in ways other than by the payment of money, determined to guard against that contingency; this by expressly requiring that the assured should be deemed to have suffered a loss only when he has paid 'in money' a liability accrued against him. That this term should be considered as one affecting the contract of the insurer in a material way seems quite plain. The requirement is to make the matter of the amount of loss one which is to be measured by the dollars expended and so place within the reach of the insurer easy proof as to loss actually suffered. Should we construe the term not to be of the substance of the contract and permit the loss to be recovered regardless of the kind of property which the assured parted with, then it might happen that the latter had paid in land, jewelry, or other merchandise, and thus an issue would arise as to the actual value of the thing given in payment of the obligation against which indemnity was claimed." [53]

In a Wisconsin case where a receiver appointed in supplementary proceedings to collect a judgment against an insolvent employer for injury to his employee gave to the employee receiver's promissory note, such a payment is not satisfaction of the claim within the meaning of an indemnity insurance policy, that no action will lie against the insurer unless brought by the assured himself, to reimburse

53. Hebojoff v. Globe Indem. Co. (Dist. Ct. of Appeals, 2nd Dist., Cal.), 169 Pac. 1048 (1918).

him for actual loss sustained and paid by him in satisfaction of a judgment, and it gave the receiver no standing to enforce the policy. "On its face," the court said, "the action taken was a mere subterfuge, resorted to for the purpose of making a nominal compliance with the terms of the insurance contract * * * there was no *bona fide* payment of the judgment. The fictitious payment resorted to is too thinly veiled to stand the test of judicial scrutiny."[54] However, the question of legal propriety and judicial authority was not involved in the decision.

§ 793. "No action" clause. Indemnity policy. (h) Paying judgment with promissory note, etc. (h1) Miscellaneous—Execution sale.

In the state of Washington, it has been held, under Rem. Comp. Stat., Sec. 590, that a sale of the assured's land on execution issued upon a judgment recovered against the assured in an action by one injured by his automobile constituted a payment in money by the assured to the extent realized on the sale, within the provision of the policy that the insurer would only be liable to reimburse the assured for loss actually paid in money.[55]

§ 794. "No action" clause. Indemnity policy. (h) Paying judgment with promissory note, etc. (h2) Borrowed money.

Where an assured, acting in good faith, borrows money to pay judgment of an injured claimant, the insurer is liable to the assured for the amount, even though the assured was insolvent.[56]

54. Stenbom v. Brown-Corliss Engine Co., 137 Wis. 564, 119 N. W. 308, 20 L. R. A. (N. S.) 956.

55. McKenna v. International Indemnity Co., 125 Wash. 28, 215 Pac. 66 (1923).

56. Campbell v. London & Lancashire Indemnity Co. of America, 168 N. Y. S. 300 (1917).

§ 795. "No action" clause. Indemnity policy. (i) Minority view.

MINORITY VIEW IS THAT WHERE THE AUTOMOBILE INSURANCE POLICY CONTAINS A "NO ACTION" CLAUSE, AND AN ACTION IS BROUGHT BY THE INJURED CLAIMANT AGAINST THE ASSURED, AND THE INSURER BY VIRTUE OF THE CONTRACT, ASSUMES CHARGE OF THE DEFENSE, THE CLAUSE IS WAIVED, AND THE COMPANY IS ESTOPPED FROM DENYING LIABILITY FOR THE DEBT. JUDGMENT CREDITOR MAY RECOVER FROM INSURANCE COMPANY IN GARNISHMENT PROCEEDING.

THE MINORITY VIEW IS THAT AN INDEMNITY INSURER WHICH HAS UNDERTAKEN TO SETTLE OR DEFEND SUITS AGAINST THE INSURED AND ACTUALLY TAKES UPON ITSELF THE DEFENSE OF AN ACTION BROUGHT AGAINST HIM CANNOT AVOID LIABILITY TO SATISFY AN ADVERSE JUDGMENT BY A PROVISION IN THE POLICY THAT NO ACTION WILL LIE AGAINST IT FOR ANY LOSS UNDER THE POLICY UNLESS IT BE FOR LOSS ACTUALLY PAID BY INSURER IN SATISFACTION OF A FINAL JUDGMENT.

The minority view holds that where the policy contains a "no action" clause, it applies only in the event that the company denies liability and refuses to defend the action against the assured. The theory of such courts as approve the minority view is that where the policy provides that the insurance company shall have sole control over the settlement of claims and complete charge of the litigation arising thereunder, and when action is instituted against the assured the insurer actually assumes responsiblity for defending the action in behalf of the assured, the "no action" clause is to all intents and purposes meaningless, and the insurer thereby waives the provision and is estopped from denying liability.

The minority view is supported by the courts of New Hampshire, Minnesota, and Florida.[57] Courts in other jurisdictions have uniformly refused to follow these decisions

57. Patterson v. Adan and Philadelphia Casualty Co., 119 Minn. 308, 138 N. W. 281, 48 L. R. A. (N. S.) 184 (1912); Reilly v. Linden, 151 Minn. 1, 186 N. W. 121 (1922); Powers v. Wilson, 139 Minn. 309, 166 N. W. 401 (1918); Elliott v. Belt Automobile Ass'n, 87 Fla. 545, 100 So. 797 (1924); Capelle v. United States Fidelity & Guaranty Co. of Baltimore, 80 N. H. 481, 120 Atl. 556 (1922).

and have repeatedly controverted the reasoning of these courts.

The leading case supporting the minority view is undoubtedly the Minnesota case of *Patterson v. Adan and Philadelphia Casualty Company.* The policy provided that "no action shall lie against the company to recover for any loss or expense under this policy, unless it shall be brought by the assured for loss or expense actually sustained and paid in money by him after trial of the issue." The court laid down the rule that the provision applied only in case the company denied liability and refused to defend. The question is of such fundamental importance that we present the facts of the case and quote liberally from the court's opinion. Plaintiff recovered a verdict against the defendant in the sum of $4,500 for an injury received through the negligence of the defendant, causing his automobile, in which plaintiff was riding, to overturn. Judgment was entered on the verdict, and defendant appealed to this court, but gave no supersedeas bond. Pending the appeal, the respondent was duly garnisheed, and upon the disclosure had, plaintiff moved for judgment. The motion was denied, and the garnishee discharged. The company carried on all the litigation. It was disclosed that the usual practice of the indemnity company in such cases was to pay the final judgment without waiting for the assured to pay it, first, however, ascertaining that the assured was absolutely able to respond to the full amount of the liability. In this instance, the company was under the mistaken impression that the assured was insolvent. The question, then, was: Did it appear upon the record that the indemnity company, the garnishee, was indebted to the injured party when the disclosure was made? Quoting from the opinion of the court: "It may be conceded that the company intended to so frame the policy that not every avenue of escape from payment in case of a loss should be closed. The main purpose of its business is to obtain and retain the premiums. The object of the assured is to get protection. The object and purpose of the contracting parties is not to be lost

sight of in construing a contract, nor is the rule that in case of ambiguity it must be resolved against the one who prepared the instrument. * * * Recognition needs to be taken of the enormous growth of liability insurance of late years. The hazards of modern industries and the risks connected with some of the advantages of present day life call for this kind of insurance. Policies attempting to fill this demand should, if possible, be construed so as not to be a delusion to those who have bought them. In soliciting business, is it supposable that the company would inform the assured that it assumed no risk if the assured, after accepting the policy, becomes so financially embarassed that no judgment could be enforced against him? Insurance companies of this kind do not, at least openly, ask for the patronage of the insolvent. They profess to give the needed protection to all. Those who procure this kind of insurance have not only their own protection in mind, but also the idea that if, through their involuntary negligence, a servant or other person sustains injury, such an one may be recompensed. But even granting that this policy is so worded that on its face it must be considered one of indemnity alone, we think that under it the company may, and in this case did, place itself in a position which has resulted in liability to the assured. If suit is brought on a claim intended to be covered by this policy, the company after notice, agreed to defend; but, not only that, it reserved to itself the exclusive right to settle or carry on the litigation, excluding the assured from any interference therewith. On these provisions the company acted, assumed the defense, and has carried on the litigation to the bitter end, even after defendant left this jurisdiction. The assured retained no voice or interest in the litigation. The company substituted its interests and its judgment for that of the assured in the action. By so doing it assumed a relation to this plaintiff, and to every plaintiff, where, under its policy, it steps into a suit, which must be considered in construing the contract. Neither public policy or legal principles can be invoked against the validity of these pro-

visions, if they mean no more than an undertaking to contest an asserted claim against the assured, for which it is liable when established; but if, under the pretense of an insurance obligation, the company carried on litigation in the name of one who has neither voice nor interest therein, and which does not affect the company itself, because the assured is unable or unwilling to pay if plaintiff is awarded judgment, it would seem the company becomes an officious intermeddler. Public policy does not permit a litigant to so surrender control of his lawsuit to one who has no interest in the cause of action. A contract between client and attorney, although the attorney has a lien for his fees on the cause of action, is void if the client is excluded from control of the cause of action. The policy here should be so interpreted, if possible, that its provisions do not run contrary to law, and that result is reached by holding that the undertaking to defend means something more than carrying on litigation in court. By undertaking the defense, the company elected to treat plaintiff's cause of action, if he had any, as covered by its contract; and when it substituted itself and its judgment for that of the defendant, both plaintiff and defendant have a right to insist that the final judgment establishes the liability and debt of the company to the assured. The undertaking to defend is of no value, and may be of great danger, to the assured, where he thus abandons all control of the suit to the company, if it does not mean that whatever liability is established shall be discharged. The company admits that where the assured is perfectly solvent, the practice of the company is to carry the defense to a successful issue by paying the judgment without stopping for the assured to pay it. It is even more important to an assured who is in financial stress that no judgment be allowed to stand unsatisfied against him than it is to one who has abundant means to satisfy it * * *."

"The 'no action' provision of the policy manifestly is not a condition precedent to liability in every instance; for then, in case of loss or damage to the automobile, also

covered by this policy, if the company does not voluntarily pay the loss, no action could lie. The company also expressly agrees to pay the costs taxed in the action and the interest on the judgment. Nevertheless a strict reading of the provision would make it incumbent on the assured to first pay these items expressly agreed to be paid by the company before there was a legal liability against it. We think a proper construction of the provision is that no suit will lie against the company, in cases where the company declined to take the defense, unless the assured actually litigated and paid the claim. In such a case there is no interference on the part of the company with the rights of either a plaintiff or the assured in the litigation and, not having elected to treat the cause of action as a risk covered by the policy, it may properly stipulate that, before the assured shall maintain a suit against it, the claim must have been tried, established, and paid. We therefore hold that in a policy such as this, where the company has come into the litigation and assumed exclusive control thereof under its contract, it recognizes a liability, if it fails to defend successfully, to pay the assured the amount of the judgment it so permits to be established, not exceeding the sum stipulated in the policy, and also that, as to the plaintiff, it should be considered that such judgment is a debt due the assured from the company, and not dependent on any contingency. Payment of the judgment, so far as the rights of the company are concerned, in such case, is a mere *pro forma* matter, and not a condition precedent to its liability to defendant under plaintiff's garnishee proceedings." [58]

In New Hampshire, an action was instituted in equity against the insurer by the administratrix of one killed by the assured's car to have the proceeds of the policy applied in satisfaction of the judgment against assured. The policy provided that the insurer would "indemnify the assured from liability imposed on him by law for loss and for ex-

58. Patterson v. Adan and Philadelphia Casualty Co., 119 Minn. 308, 138 N. W. 281, 48 L. R. A. (N. S.) 184 (1912).

penses arising or resulting from claims upon the assured for damages on account of bodily injuries or death resulting at any time therefrom, suffered by any person or persons as the result of an accident while this policy is in force by reason of the ownership, maintenance, or use" of the insured automobile. The policy contained the further provision that "no action by the assured shall lie against the company until the amount of damages for which the assured is liable by reason of any casualty covered by this policy is determined by final judgment against the assured, or any agreement between the assured and the plaintiff with the written consent of the company, nor unless the action is brought within two years after the rendition of judgment." The court held that the policy was one of liability rather than indemnity and that the clause relative to any agreement between the assured and plaintiff with the consent of the company did not limit the insurer's liability to pay on final judgment being rendered against the assured.[59]

But says an Alabama court, the construction of the insurance contract containing the "no action" clause as one of liability "is dominated by an undue regard for the injured stranger, rather than by a consideration alone of the intention and the obligations of the contracting parties. Such insurance contracts as these may be one-sided and unsatisfactory in their operation, but we know of no principle of law or public policy which forbids their operation exactly as stipulated by the parties, with which, as already stated, a stranger to the contact has absolutely no concern."[60]

C. RIGHT OF INJURED CLAIMANT TO RECOVER FROM INSURER.

RIGHT OF INJURED CLAIMANT TO RECOVER FROM THE INSURER DEPENDS UPON THE WORDING OF THE POLICY, AND STATUTORY ENACTMENT, IF ANY.

59. Capelle v. United States Fidelity & Guaranty Co. of Baltimore, 80 N. H. 481, 120 Atl. 556 (1923).

60. Goodman v. Georgia L. Ins. Co., 189 Ala. 130, 132, 66 So. 649.

CONTRACT OF INDEMNITY OR LIABILITY. IF THERE IS NO STATUTORY RIGHT, AND POLICY DOES NOT DIRECTLY SO PROVIDE, INJURED CLAIMANT'S RIGHT OF ACTION AGAINST THE INSURER IS ASCERTAINED BY DETERMINING WHETHER THE CONTRACT IS ONE OF LIABILITY OR INDEMNITY.

IF THE CONTRACT IS ONE OF LIABILITY, THE INJURED CLAIMANT, AFTER OBTAINING JUDGMENT AGAINST ASSURED, HAS RIGHT OF ACTION AGAINST HIS INSURER, BUT BY WEIGHT OF AUTHORITY HE HAS NO SUCH RIGHT UNDER INDEMNITY POLICY CONTAINING "NO ACTION" CLAUSE.

§ 796. In general.

The right of the injured claimant to recover from the insurer depends upon the wording of the policy,[61] or the provisions of the statute, if any. The right under the policy, if there is no statutory enactment, is mainly ascertained by determining whether the contract is one of liability or indemnity. This subject is closely allied to that of indemnity and liability policies (supra) and the cases there cited, when and where applicable, are controlling. If the policy is an ordinary indemnity policy which provides that the insurer will indemnify the assured only against actual pecuniary loss suffered by the payment in money of a judgment procured against him and contains the "no action" clause, the injured claimant has no right of action against the insurer. But, if the policy is one of liability and does not

61. Goodman v. Georgia Life Ins. Co., 189 Ala. 130, 66 So. 649 (1914); Hollings v. Brown, 202 Ala. 504, 80 So. 792; Globe Indemnity Co. v. Martin, 214 Ala. 646, 108 So. 761 (1926); Gugliemetti v. Graham, 50 Cal. App. 268, 195 Pac. 64 (1920); Milliron v. Dittman, 180 Cal. 443, 181 Pac. 779 (1919); Malachowski v. Varro, 76 Cal. App. 207, 244 Pac. 936 (1926); Aplin v. Smith, 197 Iowa 388, 197 N. W. 316 (1924); Transylvania Casualty Ins. Co. v. Williams, 209 Ky. 626, 273 S. W. 536 (1925); New York Indemnity Co. v. Ewen, 221 Ky. 114, 298 S. W. 182 (1927); Patterson v. Adan, 119 Minn. 308, 138 N. W. 281, 48 L. R. A. (N. S.) 184 (1912); Powers v. Wilson, 139 Minn. 309, 166 N. W. 401 (1918); Small v. Morrison, 185 N. C. 577, 118 S. E. 12 (1923); Hanson v. Hayman (Tex. Civ. App.), 280 S. W. 869 (1926); American Automobile Ins. Co. v. Cone (Tex. Civ. App.), 257 S. W. 961 (1923); Combs v. Hunt, 140 Va. 627, 125 S. E. 661 (1924), 37 A. L. R. 621; O'Neal v. Pocahontas Transportation Co., 99 W. Va. 456, 129 S. E. 478 (1925); Shepherd v. Pocahontas Transportation Co., 100 W. Va. 703, 131 S. E. 548 (1926); Conwell v. Hays, 103 W. Va. 69, 136 S. E. 604 (1927); Stusser v. Mutual Union Ins. Co., 127 Wash. 449, 221 Pac. 331 (1923).

contain the "no action" clause, it is generally held that the injured claimant, as a judgment creditor of the assured, has a right of action, at least in equity, against the insurer.[62]

However, where the policy provides that an injured claimant shall be entitled to maintain an action against the insurer if the assured is insolvent, such a claimant who has been injured as the result of assured's negligence, upon proof of assured's insolvency, has a right of recovery in an action against the insurer.[63]

§ 797. Terms of policy.

To maintain an action on automobile liability policy, the terms of the policy must make the insurance company liable to owner of automobile for damages which may be recovered.[64]

Where the policy contains the provision that in case execution against the assured is returned unsatisfied in an action brought by the injured person, because of the insolvency or bankruptcy of the assured, an action for the amount of the judgment, but not exceeding the amount of the policy, may be maintained against the company by the injured person, beneficially interested in the contract, even though there is no statute providing that such a policy shall be written, the policy inures to the benefit of such injured third party claimants though their identity was unknown at the time the policy was executed.[65]

§ 798. Privity of contract.

Where a so-called "surety bond," which was really in the nature of liability insurance policy, was executed in behalf

62. Globe Indemnity Co. v. Martin, 214 Ala. 646, 108 So. Rep. 761 (1926), and cases cited under "Indemnity and Liability Insurance", supra.

63. Lackey v. Olds & Stoller Inter-Exchange, 80 Cal. App. 687, 252 Pac. 672 (1927).

64. Fanslau v. Rogan, 194 Wis. 8, 215 N. W. 589 (1927); (Wisconsin Stat. 1925, sec. 85. 25).

65. Finkelberg v. Continental Casualty Co., 126 Wash. 543, 219 Pac. 12 (1923).

of an automobile stage owner, as principal, for the benefit of all persons who might receive injuries as the result of the negligent operation of the principal's automobile stage, the contract would inure for the benefit of any third parties so injured, and the insurer had no valid defense on the theory that there was no privity of contract between such third parties and the company.[66]

§ 799. Policy creating separate right of action.

In a California case, the policy indemnified the assured against loss arising from the liability imposed by law on account of injury to or destructon of property of any description resulting from the use of assured's automobiles, and provided that it should inure to the benefit and protection of anyone who should sustain any damage or injury by reason of the negligence of the drivers of assured's cars. The court held that the policy created a primary liability in the insurer to any injured claimant, and that such claimant had an immediate right of action against the insurer regardless of whether a separate action had been brought against the assured.[67]

§ 800. Insurer's liability. Policy inuring to benefit of injured claimants.

Policy may provide that it inures to the benefit of third persons who sustain injuries by reason of assured's negligent operation of his automobile or bus.[68] In such a case, the injured claimant has a direct right of action on the policy against the insurer, but the insurance company's liability depends upon that of the assured.[69]

66. Stusser v. Mutual Union Insurance Co., 127 Wash. 449, 221 Pac. 331 (1923).

67. Gugliemetti v. Graham, 50 Cal. App. 268, 195 Pac. 64 (1920).

68. Smith Stage Co. v. Eckert, 21 Ariz. 28, 184 Pac. 1001 (1919); Arizona Mutual Automobile Ins. Co. v. Bernal, 23 Ariz. 276, 203 Pac. 338 (1922); Malachowski v. Varro, 76 Cal. App. 207, 244 Pac. 936 (1926); American Automobile Ins. Co. v. Struwe (Tex. Civ. App.), 218 S. W. 534 (1920).

69. Whitney v. Employers' Indemnity Corp., 200 Iowa 25, 202 N. W. 236 (1925); Humphrey v. Polski, 161 Minn. 61, 200 N. W. 812 (1924); Eckert v.

Injured claimant has no right of recovery from the insurer unless the accident is covered by the terms of the policy.[70] For example, there was no right of recovery in these cases: (a) where the assured was not the owner of the car at the time of the accident;[71] (b) where owner was insured against loss or liability growing out of the use of the automobile while being used as a pleasure car subject to call from the garage only, and the car was not so used at the time claimant was injured;[72] (c) where the car license was transferred to vendee;[73] (d) where assured's car was being used by a chauffeur for his own purposes and without the consent of the owner;[74] (e) where insurer is not liable to assured for private counsel fees, the injured party cannot recover from the insurer in garnishment proceeding for such a claim;[75] (f) policy must be in force and effect at the time of injury;[76] (g) where the policy insured against liability while the car was in "use by myself," injured claimant could not recover from insurer for injuries received while car was being driven by another, although assured was in car at the time.[77]

Joice, 152 Minn. 440, 189 N. W. 125 (1922); Kennedy v. Travelers Ins. Co., 217 N. Y. S. 261 (1926); Small v. Morrison, 185 N. C. 577, 118 S. E. 12 (1923); Roberts v. United States Fidelity & Guaranty Co., 188 N. C. 795, 125 S. E. 611 (1924); Combs v. Hunt, 140 Va. 627, 125 S. E. 661 (1924), 37 A. L. R. 621.

70. Whitney v. Employers Indemnity Corporation, 200 Iowa 25, 202 N. W. 236 (1925); Mathews v. Bloomfield, 246 Mass. 510, 141 N. E. 494 (1923); Bess v. Commonwealth Casualty Co., 101 N. J. L. 380, 128 Atl. 250 (1925); Schoenfeld v. New Jersey Fidelity & Plate Glass Ins. Co., 203 App. Div. 796, 197 N. Y. S. 607 (1922); Boling v. Ashbridge, 111 Okla. 66, 238 Pac. 421 (1925); Automobile Insurance Co. v. Cone (Tex. Civ. App.), 257 S. W. 961 (1923); Lucas v. Mueller, 183 Wis. 529, 198 N. W. 286 (1924).

71. Whitney v. Employers' Indemnity Corporation, 200 Iowa 25, 202 N. W. 236 (1925).

72. Mathews v. Bloomfield, 246 Mass. 510, 141 N. E. 494 (1923).

73. Bess v. Commonwealth Casualty Co., 101 N. J. L. 380, 128 Atl. 250 (1925).

74. Shoenfeld v. New Jersey Fidelity & Plate Glass Ins. Co., 203 App. Div. 796, 197 N. Y. S. 607 (1922).

75. Boling v. Ashbridge, 111 Okla. 66, 238 Pac. 421 (1925).

76. Automobile Insurance Co. v. Cone (Tex. Civ. App.), 257 S. W. 961 (1923).

77. Lucas v. Mueller, 183 Wis. 529, 198 N. W. 286 (1924).

Creditor enforcing policy indemnifying against loss from liability for negligence stands in the shoes of the assured, and forfeits insurance if there has been a breach of the policy conditions.[78]

§ 801. Insurer's liability. Policy inuring to benefit of injured claimants. (a) Car operated with consent of owner —Evidence.

No liability was predicable on policy where the evidence failed to establish that use of automobile injuring plaintiff was with owner's consent.[79]

§ 802. Insurer's liability. Policy inuring to benefit of injured claimants. (b) Joint tort feasor.

Where an insurance company as surety and the bus driver as principal executed a bond conditioned that the driver pay all damages to persons injured by his neglect to the aggregate of $2,500 and plaintiff reduced his claim to judgment the insurance company is liable for the whole amount of the bond though a joint tort feasor had paid a portion of the judgment and had been released in writing.[80]

§ 803. Insurer's liability. Policy inuring to benefit of injured claimants. (c) Public conveyance for carrying passengers.

An accident policy provided for the payment of double indemnity where injuries were "received while riding as a passenger in a public conveyance provided for passenger service and propelled by gasoline." While plaintiff's deceased husband was one of a party being conveyed in gasoline automobile as a passenger for hire, the car collided with

78. Weatherwax v. Royal Insurance Co., 250 N. Y. 281, 165 N. E. 293, rev. 228 N. Y. S. 919 (1929).

79. Kazdan v. Stein, 118 Ohio St. 217, 160 N. E. 506.

80. Stusser v. Mutual Union Ins. Co., 127 Wash. 449, 221 Pac. 331 (1924).

a telegraph pole, and he was killed. The court held that, as the automobile was a common carrier for public conveyance, the insurer was liable under the terms of the policy.[81]

Under a contract insuring a company operating an automobile stage line, where it was made to inure to the benefit of any one who should sustain any damage or injury, the insurer is a proper party to an action for damages.[82]

§ 804. Liability imposed by law.

A bond insuring against injury to persons by assured's automobiles from assured's or assured's agents' carelessness, negligence, or unlawful acts, while transporting passengers for hire and providing for insurer contesting claims in contested suits and limiting liability for damages, is a bond for any liability imposed by law and not a mere indemnity bond.[83]

§ 805. Judgment—To what extent conclusive.

JUDGMENT AGAINST ASSURED IS ONLY CONCLUSIVE AGAINST INSURER AS TO THE FACTS THEREIN ESTABLISHED AND LITIGATED.

While one who is required to protect another from liability is bound by the result of litigation to which such other is a party, provided the former had notice of such litigation, and an opportunity to control its proceedings, a judgment against a party indemnified is conclusive in a suit against his indemnitor only as to the facts thereby established. The estoppel created by the first judgment cannot be extended beyond the issue necessarily determined by it.[84]

Where insurer denied liability but consented to judgment being taken against assured for negligent operation of his car without prejudice to deny its right to assured's claim

81. Primrose v. Casualty Co., 67 Legal Intelligencer, 308 (1910), 37 Pa. Co. Ct. Rep. 441 (1910).

82. Guglielmetti v. Graham, 50 Cal. App. 268, 195 Pac. 64 (1920).

83. Fenton v. Poston (Mutual Union Ins. Co. Garnishee), 114 Wash. 217, 195 Pac. 31 (1921).

84. Bryson v. International Indemnity Co., 88 Cal. App. 100, 262 Pac. 790; Pezel v. Yerex, 56 Cal. App. 304, 309, 205 Pac. 475, 14 R. C. L. 62.

of liability, judgment was not conclusive against the insurer that the injury was the result of assured's negligence and not some other cause.[85]

If the assured violated the terms and conditions of the liability contract prior to the injured claimant recovering judgment against him, as by failure and refusal to cooperate with the insurance company in defense of the action, the insurer has a right to raise such issues as a defense in any action that may be instituted by the claimant against the insurer.[86]

§ 806. Judgment—When obtained without knowledge of insurer.

INSURER UNDER AUTOMOBILE INDEMNITY POLICY GUARANTEEING PAYMENT OF JUDGMENT AGAINST ASSURED IS LIABLE TO PAY JUDGMENT OBTAINED WITHOUT ITS KNOWLEGE, IN THE ABSENCE OF FRAUD.

In a California case, the policy read: "It is hereby understood and agreed that in the event a final judgment covering any loss or claim under this policy is rendered against the subscriber, the Exchange guarantees the payment of said judgment direct to the plaintiff securing such judgment, irresponsive of any financial responsibility on the part of the subscriber, etc." The policy contained the further provision that in case suit was instituted against the subscriber, he would immediately forward to the insurer every summons, notice or other process as soon as service was made upon him. The court held that failure on the part of the subscriber to comply with the provision as to giving the insurer notice did not affect the injured party's right to have a judgment directly paid to him, even though

85. Syracuse v. Standard Accident Insurance Co., 210 App. Div. 165, 205 N. Y. S. 437 (1924).

86. Guerin v. Indemnity Insurance Co. of North America, 107 Conn. 649, 142 Atl. 269 (1928); Schoenfeld v. New Jersey Fidelity & Plate Glass Insurance Co., 203 App. Div. 796, 197 N. Y. S. 607; Roth v. National Automobile Mutual Casualty Co., 202 App. Div. 667, 195 N. Y. S. 865 (1922).

the insurer was not a party to the action, where there was no fraud in the procurement of the judgment.[87]

Where the liability policy gives to third party claimants a right of action against the insurance company, such beneficiaries are under no obligation to notify the insurer of an action instituted against the assured; and even though the assured, by the terms of the policy, is obligated to notify the insurer of such an action, his failure to do so will not defeat the right of third party claimants to recover from the insurer.[88]

STATUTES.

STATUTES HAVE BEEN ENACTED WHICH PREVENT THE INSERTION IN LIABILITY INSURANCE CONTRACTS OF THE CLAUSE MAKING PAYMENT CONDITIONAL UPON SATISFACTION BY THE ASSURED OF THE JUDGMENT AGAINST HIM.

INSOLVENCY. STATUTE OF NEW YORK PROVIDES THAT THE INVOLVENCY OR BANKRUPTCY OF THE ASSURED SHALL NOT RELEASE THE INSURER, AND IN CASE EXECUTION AGAINST ASSURED IS RETURNED UNSATISFIED, ACTION MAY BE MAINTAINED AGAINST INSURER.

IN CALIFORNIA, RETURN OF EXECUTION UNSATISFIED IS NOT NECESSARY.

§ 807. Statutes.

Statutes have been enacted which prevent the insertion in liability insurance policies of the clause making payment conditional upon satisfaction by the assured of the judgment against him. The purpose of such legislation is to give to the injured claimant who has obtained a judgment against the assured and has been unable to collect it a direct right to recover from the insurer, and to prevent of such

87. Kruger v. California Highway Indemnity Exchange, 201 Cal. 672, 258 Pac. 602 (1927).

88. Finkelberg v. Continental Casualty Co., 126 Wash. 543, 219 Pac. 12 (1923).

claimant being deprived of such a right of cancellation of the policy after assured's liability to him has accrued.[89]

§ 808. Statutes—Insolvency.

New York statute[90] requires that all automobile liability policies contain a provision that the insolvency or bankruptcy of the insurer shall not release the insurer from the payment of damages for injuries sustained during the life of the policy, and that, in case execution against the insured should be returned unsatisfied, an action may be maintained by the injured person against the insurance company for the amount of the judgment, but not exceeding the amount of the policy. Such a statute, it has been held by the supreme court of the United States in *Merchants' Mutual Automobile Liability Insurance Co. v. Smart,* comes within the police power of the state, and is not unconstitutional.[91]

89. **ALABAMA**—Code 1928, secs. 8376, 8377; Globe Indemnity Co. v. Martin, 214 Ala. 646, 108 So. 761 1(926); Metroplitan Casualty Ins. Co. v. Blue, —— Ala. ——, 121 So. 25 (1929).

CALIFORNIA—Gen. Laws, Act 3738; Marple v. American Automobile Ins. Co., 82 Cal. App. 137, 255 Pac. 260 (1927); Pigg v. International Indemnity Co., 86 Cal. App. 671, 261 Pac. 486 (1927); Malmgren v. Southwestern Automobile Ins. Co., 201 Cal. 29, 255 Pac. 512 (1927).

CONNECTICUT—Laws 1919, ch 331; O'Connor v. Hartford Accident & Indemnity Co., 97 Conn. 8, 115 Atl. 484 (1921); Shea v. U. S. F. & G. Co., 98 Conn. 447, 120 Atl. 286 (1923);

MASSACHUSETTS—Stat. 1914, c. 464, Gen. Laws, ch. 175, secs. 11, 113; Williams v. Nelson, 228 Mass. 191, 117 N. W. 189 (1917); Lorando v. Gethro, 228 Mass. 181, 117 N. E. 185, 1 A. L. R. 1374 (1917).

NEW HAMPSHIRE—Laws 1927, c. 54, sec. 3;

OHIO—Gen. Code, secs. 9510-3, 9510-4; Steinbach v. Maryland Casualty Co., 15 Ohio App. 392 (1921); Stacey v. Fidelity & Casualty Co., 114 Ohio St. 633, 151 N. E. 718,

RHODE ISLAND—Gen. Laws, 1923, sec. 3815; Coderre v. Travelers Ins. Co. 48 R. I. 152, 136 Atl. 305 (1927); Riding v. Travelers Ins. Co. 48 R. I. 433, 138 Atl. 186 (1927); Bell v. Weiner, 46 R. I. 478, 129 Atl. 339 (1925).

WISCONSIN—Stat. sec. 85. 25; Ducommun v. Inter-State Exch., 193 Wis. 179, 214 N. W. 616 (1927); Bro. v. Moran, 194 Wis. 293, 215 N. W. 431 (1927); Fanslau v. Rogan, 194 Wis. 8, 215 N. W. 589 (1927).

90. New York Insurance Laws, sec. 109.

91. Merchants Mutual Automobile Liability Insurance Co. v. Smart, 267 U. S. 126, 69 L. Ed. 538, 45 Sup. Ct. Rep. 320, aff'g 236 N. Y. 577, 142 N. E. 290 (1924); dism'g appeal from 206 App. Div. 630, 198 N. Y. S. 949 (1923).

It does not make an unlawful preference under the National Bankruptcy Act.[92]

"Automobiles," said the court in this case, "present such possibilities of accident and injury to members of the public that the owners have recourse to insurance to relieve them from the risk of heavy recoveries they run in intrusting these more or less dangerous instruments to the care of their agents. Having in mind the sense of immunity of the owner protected by the insurance and the possible danger of a less degree of care due to that immunity, it would seem to be a reasonable provision by the state in the interest of the public, to require that the owner in the contract indemnifying him against any recovery from him should stipulate with the insurance company that the indemnity by which he saves himself should certainly inure to the benefit of the person who thereafter is injured."[93]

The New York state statute providing for suit by injured party against insurer where execution is returned unsatisfied renders nugatory any provision in an automobile liability policy limiting the action to recovery of money paid by the assured.[94]

In interpreting the meaning of the word "insolvency" as used in the New York statute, it should be given its usual broad meaning of financial irresponsibility, and is not to be construed as referring only to judicial insolvency, for such a construction would largely defeat the purpose of the enactment.[95]

The words "insolvency or bankruptcy" as used in the liability policy, have been given the same interpretation by a Maryland court. Citing the New York case of *Miller v.*

92. Merchants Mutual Automobile Liability Insurance Co. v. Smart, 267 U. S. 126, 69 L. Ed. 538, 45 Sup. Ct. Rep. 320, aff'g 236 N. Y. 577, 142 N. E. 290 (1924), dism'g appeal from 206 App. Div. 630, 198 N. Y. S. 949 (1923).

93. Merchants' Mutual Automobile Liability Ins. Co. v. Smart, 267 U. S. 126, 129, 45 S. Ct. 320, 321, 69 L. Ed. 538, 542.

94. Weiss v. New Jersey Fidelity & Plate Glass Ins. Co., 228 N. Y. S. 314, 131 Misc. Rep. 836 (1928).

95. Miller v. Union Indemnity Co., 209 App. Div. 455, 204 N. Y. S. 730 (1924).

Union Indemnity Company[96] with approval, the Maryland court says: "Do the words 'insolvency or bankruptcy,' as employed in this clause of the contract, mean inability of Price to meet his financial obligations, or do they mean that Price must have been adjudicated an insolvent or bankrupt? Argument can be advanced in support of either of these contentions, but we think, when the whole policy is considered, together with the history of and purpose intended to be accomplished by the inclusion of this clause in the contract, the former contention is correct, and the term 'insolvency or bankruptcy' must be held to have reference to the actual financial inability of the insured to pay the judgment rendered against him, rather than an adjudication of insolvency or bankruptcy by a court of competent jurisdiction. Under the provision of the National Bankruptcy Law, certain designated persons are not the subject of involuntary bankruptcy, and if the insured, under a policy such as in this case, belonged to that class and did not voluntarily apply for bankruptcy adjudication, such failure would render nugatory the provisions of the clause now under consideration. It was clearly not the intention of the parties to the contract to make such a result possible, and it would require a judicial determination of insolvency or bankruptcy as a condition precedent to the right of recovery.

"Where it is a controverted question, we do not wish to be understood as deciding that the return of *nulla bona* by the sheriff to a writ of execution, standing alone, is sufficient to establish the insolvency or bankruptcy of the insurer, as that term is used in the policy here considered, but that, when such a return is made by the sheriff, the question of insolvency or bankruptcy remains a fact to be proved by competent evidence." [97]

In a recent Alabama case, the injured claimant had obtained judgment against one who had operated automobile

96. Miller v. Union Indemnity Co., 209 App. Div. 455, 204 N. Y. S. 730 (1924).

97. United States Fidelity & Guaranty Co. v. Williams, 148 Md. 289, 129 Atl. 660 (1925).

with permission of adult member of owner's household. Suit having been instituted against the insurer to collect the amount of the judgment, the court held that operator became the assured within provision of the liability policy authorizing action against insurer in case of insolvency or bankruptcy of assured. The provision was construed to refer to assured's financial ability to pay judgment against him rather than an adjudication of "insolvency or bankruptcy." Recovery was not limited to sue insurer for damages arising from personal injuries only.[98]

New York statute "provides that the subrogation shall take place only when the insured proves insolvent or bankrupt, and leaves the injured person to pursue his judgment against the insured if solvent without reliance on the policy."[99] Assured or his personal representative has right of action under this statute against the insurer where judgment has been obtained against assured for his negligent conduct, where he is insolvent or has been discharged in bankruptcy.[1] Thus, a recovery was had where the policy provided that "in case of such insolvency or bankruptcy an action may be maintained by the person injured against the company under the terms of the policy."[2]

It is clear from the wording of the statute that the injured claimant who has recovered a judgment against the assured has no right of action against the insurer by reason of insolvency or bankruptcy until an execution issued upon the judgment has been returned unsatisfied.[3]

Unsatisfied execution returned in county of assured's

98. Metropolitan Casualty Ins. Co. v. Blue, —— Ala. ——, 121 So. 25 (1929).

99. Merchants Mutual Automobile Liability Insurance Co. v. Smart, 267 U. S. 126, 45 Sup. Ct. 320, aff'g 236 N. Y. S. 577, 142 N. E. 290 (1925).

1. O'Connell v. New Jersey Fidelity & Plate Glass Ins. Co., 201 App. Div. 117, 193 N. Y. S. 911 (1922).

2. Roth v. National Automobile Mutual Casualty Co., 202 App. Div. 667, 195 N. Y. S. 865 (1922).

3. Merchants Mutual Automobile Liability Insurance Co. v. Smart, 267 U. S. 126, 69 L. Ed. 538, 45 Sup. Ct. 320, aff'g 236 N. Y. 577, 142 N. E. 290 (1924); Schoenfeld v. New Jersey Fidelity & Plate Glass Ins. Co., 203 App. Div. 796, 197 N. Y. S. 607 (1922).

domicile will *prima facie* establish assured's financial irresponsibility under automobile liability policy.[4]

The California statute provides that "no policy of insurance against loss or damage resulting from accident to, or injury suffered by another person and for which the person injured is liable * * * shall be issued or delivered to any person in this state by any domestic or foreign insurance company, authorized to do business in this state, unless there shall be contained within such policy a provision that the insolvency or bankruptcy of the person insured shall not release the insurance carrier from the payment of damages for injury sustained or loss occasioned during the life of such policy, and stating that in case judgment shall be secured against the insured in an action brought by the injured person or his heirs or personal representatives, in case death resulted from the accident, then an action may be brought against the company, on the policy and subject to its terms and limitations, by such injured person, his heirs or personal representatives as the case may be, to recover on said judgment, etc."[5] The statute is founded on principles of public policy, and cannot be enlarged, circumscribed, defeated, or modified by any provision in the insurance contract to the contrary.[6] Under California statute, return of unsatisfied execution on judgment against assured for negligently causing bodily injuries by automobile is not prerequisite to commencement of action by judgment creditor against insurance carrier.[7]

Where one is insured "against loss or damage on account of the bodily injury or death by accident of any person",

4. Weiss v. New Jersey Fidelity & Plate Glass Ins. Co., 131 Misc. Rep. 836, 228 N. Y. S. 314 (1928).

5. Gen'l Laws of California, Act 3738.

6. Malmgren v. Southwestern Automobile Ins. Co., 201 Cal. 29, 255 Pac. 512 (1927).

7. Malmgren v. Southwestern Automobile Ins. Co., 201 Cal. 29, 255 Pac. 512 (1927); Marple v. American Automobile Ins. Co., 82 Cal. App. 137, 255 Pac. 260 (1927); Pigg v. International Indemnity Co., 86 Cal. App. 671, 261 Pac. 486 (1927); Langley v. Zurich General Accident & Liability Ins. Co., —— Cal. App. ——, 275 Pac. 963 (1929).

a Massachusetts statute[8] gives to the injured claimant who has procured a judgment against the assured a right to proceed in equity against both the insured and the insurer, to recover and apply the insurance money to the satisfaction of the judgment. The statute was held constitutional[9] and was construed to give a direct right of action in equity to judgment claimant who sustained physical injuries against the insurer.[10] Rhode Island statute[11] authorizes direct action by an injured person against a liability insurer where the return as to the assured is "not found." But the statute has been construed as applying to such contracts of insurance as are made within that state.[12] Thus it was held that a resident of the state of Rhode Island, who was injured in an automobile accident caused by non-resident in the state could not proceed directly against insurer issuing liability policy to non-resident out of the state.[13]

§ 809. Procedure. Pleading and practice. (a) Right of action —Partnership.

Policy issued to a partnership which was conducting a garage gave to the injured claimant a right of action against the insurer on judgment procured against the assured, where execution was returned unsatisfied. Claimant was injured by automboile being driven by an employee of the partnership, but judgment was against one of the partners alone. The court held that the injured claimant had no right of action against the insurer, as the judgment was not against the partnership.[14]

8. Masschusetts Stat. 1914, ch. 464; Gen. Laws, ch. 175, secs. 112, 113.
9. Lorando v. Gethro, 228 Mass. 181, 117 N. E. 185 1 A. L. R. 1374 (1917).
10. Williams v. Nelson, 228 Mass. 191, 117 N. E. 189, Ann. Cas. 1918D, 538.
11. Coderre v. Travelers Insurance Co., 48 R. I. 152, 136 Atl. 305 (1927).
12. Coderre v. Travelers Insurance Co., 48 R. I. 152, 136 Atl. 305 (1927).
13. Riding v. Travelers Insurance Co., 48 R. I. 433, 138 Atl. 186 (1927).
14. Jacobs v. Maryland Casualty Co., 198 App. Div. 470, 191 N. Y. S. 692 (1921).

§ 810. Procedure. Pleading and practice. (b) Judgment on writ of inquiry. Notice.

In an action of enforce claim under policy issued to a taxicab company under New York highway law, where the policy provided that the "failure of the assured to comply with the requirements of the policy shall not prejudice the right of any person other than the assured to recover hereunder", it was held that the rights of the injured claimant to recover were not prejudiced because judgment was entered by default on writ of inquiry without notice having been given by the assured to the insurance company.[15]

§ 811. Procedure. Pleading and practice. (c) Parties.

Where an injured claimant is made the beneficiary under an automobile liability policy, in an action against the assured, the insurer may also be joined as a party defendant, even though the policy provides that the insurance company shall only be liable after judgment has been obtained against the assured. Otherwise, such claimant, as judgment creditor of the assured, would sue the insurance company in an independent action on the judgment.[16]

In an action by the injured claimant on the policy, the assured and the insurer may be joined as defendants under the code provision that when two causes of action are connected with each other or grow out of the same transaction, they may properly be joined, and in such a suit all parties against whom the plaintiff asserts a common or alternative liability may be joined as defendants.[17]

15. Devlin v. New York Mutual Casualty Taxicab Ins. Co., 123 Misc. 784, 206 N. Y. S. 365, aff'd with modifications, 213 App. Div. 152, 210 N. Y. S. 57 (1925).

16. American Automobile Co. v. Struwe (Tex. Civ. App.), 218 S. W. 534 (1920).

17. Devoto v. United Automobile Transportation Co., 128 Wash. 604, 223 Pac. 1050, aff'd on rehearing, 130 Wash. 707, 226 Pac. 1118 (1924); American Automobile Co. v. Struwe (Tex. Civ. App.), 218 S. W. 534 (1920).

§ 812. Procedure. Pleading and practice. (d) Parties—Constitutionality.

A statute which authorizes plaintiff to join as defendants the assured and the insurer, in an action for injuries sustained by claimant, where it does not allow recovery beyond the face amount of the policy, is not unconstitutional.[18]

§ 813. Procedure. Pleading and practice. (e) Joint defendants —Burden of proof.

Where the insurance company is made a joint defendant with the assured, the burden of proof is on the injured claimant, as plaintiff, to prove an existing liability of the company to the assured under the automobile liability policy at the time of the accident.[19]

§ 814. Procedure. Pleading and practice. (f) Time of action.

Where policy prescribed that action should be brought within ninety days from date of judgment against assured, a suit brought after that time could be dimissed.[20]

§ 815. Procedure. Pleading and practice. (g) Defense.

Insurer under automobile liability policy, sued by injured person could assert any defense available in action by insured.[21]

§ 816. Procedure. Pleading and practice. (h) Defense—Right to repudiate liability.

An insurer undertaking to defend an action against the assured may prove that it reserved right to repudiate liability under the policy, and assured's consent to such reservation may be either express or implied.[22]

18. Bell v. Weiner, 46 R. I. 478, 129 Atl. 339 (1925).
19. Bell v. Weiner, 46 R. I. 478, 129 Atl. 339 (1925).
20. Wilensky v. Georgia Casualty Co., 103 N. J. 207, 131 Atl. 679 (1926).
21. N. Y. Ins. Law, Par. 109, as added by Laws 1917, ch. 524, and amended 1924, ch. 639; Weiss v. New Jersey Fidelity & Plate Glass Ins. Co., 228 N. Y. S. 314, 131 Misc. Rep. 836.

§ 817. Procedure. Pleading and practice. (i) Execution unsatisfied.

Passenger cannot maintain action against negligent automobile driver's insurer until return unsatisfied of execution against assured, though assured's insolvency entitles claimant to maintain the action.[23]

§ 818. Procedure. Pleading and practice. (j) Execution unsatisfied—Joinder.

Where injured claimant has no right to sue the insurer until return of execution unsatisfied against the assured, it is a misjoinder of defendants to join assured and the insurance company in an action based on assured's negligence, and the complaint will be dismissed.[24]

§ 819. Procedure. Pleading and practice. (k) Costs.

Where the insurer has agreed to pay the costs taxed against assured in an action arising under the policy, the injured claimant, as a judgment creditor, can recover from the insurer in a garnishment proceeding.[25]

D. NOTICE OF ACCIDENT OR CLAIM.

COMPLIANCE WITH THE PROVISION OF THE LIABILITY POLICY REQUIRING IMMEDIATE WRITTEN NOTICE IS USUALLY A CONDITION PRECEDENT TO ASSURED'S RIGHT OF RECOVERY, UNLESS WAIVED.

BUT SUCH A PROVISION DOES NOT APPLY TO EVERY TRIVIAL OCCURRENCE, EVEN THOUGH IT MAY AFTERWARDS PROVE TO RESULT IN SERIOUS INJURY.

IF THERE IS NO APPARENT INJURY FROM THE MISHAP AND NO REASONABLE GROUND FOR BELIEVING THAT BODILY INJURY WILL

22. Weiss v. New Jersey Fidelity & Plate Glass Ins. Co., 131 Misc. Rep. 836, 228 N. Y. S. 314 (1928).

23. New York Indemnity Company Co. v. Ewen, 221 Ky. 114, 298 S. W. 182 (1927).

24. Small v. Morrison, 185 N. C. 577, 118 S. E. 12 (1923).

25. London & Lancashire Indemnity Co. v. Cosgriff, 144 Md. 660, 125 Atl. 529 (1924); United States Fidelity & Guaranty Co. v. Williams, 148 Md. 289, 129 Atl. 660 (1925).

FOLLOW, THERE IS NO DUTY UPON THE ASSURED TO NOTIFY THE INSURER.

NOTICE WITHIN REASONABLE TIME UNDER ALL CIRCUMSTANCES OF THE CASE IS SUFFICIENT.

§ 820. In general.

The public liability automobile insurance policy usually provides that "upon the occurrence of an accident covered by this policy, the assured shall give immediate written notice thereof, with the fullest information obtainable at the time, to the corporation's home office at * * * or to the corporation's authorized agent. If a claim is made on account of such accident the assured shall give like notice thereof with full particulars * * *."

§ 821. Condition precedent.

Compliance with the provision of liability policy that the assured shall give the insurer immediate written notice is usually a condition precedent to assured's right of recovery.[26]

§ 822. Rule of reasonable construction.

Provision of liability policy requiring immediate written notice of the occurrence of an accident is not unreasonable. Its purpose is to enable the insurer to promptly inform itself concerning the same, so that it may investigate the circumstances, prepare for a defense, if necessary, or be advised whether it is prudent to settle any claim arising therefrom. Some courts even construe such provisions in favor of the insurer.[27] Such a provision executed "to indemnify the assured against loss from the liability imposed by law upon the assured for damages on account of bodily

26. Millard v. Aetna Casualty & Surety Co., 208 App. Div. 245, 203 N. Y. S. 377 (1924); U. S. Fidelity & Guaranty Co. v. Carmichael, 195 Mo. App. 93, 190 S. W. 648; General Accident Fire & Life Assurance Corp., Ltd. v. Butler's Ice Cream Factory (Tex. Civ. App.), 291 S. W. 674, aff'd (Comm'n of App. of Tex.), 5 S. W. (2nd) 976 (1928); Underwood Veneer Co. v. London Guarantee & Accident Co., 100 Wis. 378, 75 N. W. 996.

27. See cases cited in Chapin v. Ocean Accident & Guarantee Corporation, 96 Neb. 213, 147 N. W. 465 (1914); 52 L. R. A. (N. S.) 227.

injuries (including death at any time resulting therefrom) accidentally suffered," etc., does not require notice of all accidents, but is construed to mean that notice is only required of such accidents as result in bodily injuries.[28] In a case where no bodily injury is apparent at the time of the accidental occurrence, and there is no reasonable ground for believing that a claim for damages against the owner of the automobile may arise thereform, he is not required to give the insurer notice until the subsequent facts as to injury would suggest to a person of ordinary and reasonable prudence that a liability to the injured person might arise.[29] "Immediate" notice of claim requires notice within a reasonable time under all the circumstances.[30]

§ 823. Due diligence.

THE QUESTION OF THE SUFFICIENCY OF THE EXCUSE OFFERED AND THE REASONABLENESS OF THE TIME IN WHICH THE ACT IS PERFORMED IS TO BE DETERMINED ACCORDING TO THE NATURE AND CIRCUMSTANCES OF EACH INDIVIDUAL CASE, THE ASSURED IN ALL CASES BEING REQUIRED TO ACT WITH DUE DILIGENCE AND WITHOUT LACHES ON HIS PART.

In a Nebraska case, plaintiff's automobile, on March, 1911, when being driven by his employee, collided with one William N. Lewis, who was then riding a bicycle. The fender struck Lewis with sufficient force to throw him from the bicycle to the pavement and shock him. Plaintiff was immediately notified, and at once interviewed Lewis, and was told by Lewis that he was not hurt. Relying on the

28. Chapin v. Ocean Accident & Guarantee Corporation, 96 Neb. 213, 147 N. W. 465 (1914); 52 L. R. A. (N. S.) 227.

29. Chapin v. Ocean Accident & Guarantee Corporation, 96 Neb. 213, 147 N. W. 465 (1914), 52 L. R. A. (N. S.) 227; Haas Tobacco Company v. American Fidelity Co., 266 N. Y. 343, 123 N. E. 755 (1919), 13 A. L. R. 132; Melcher v. Ocean Accident & Guarantee Corporation, 266 N. Y. 51, 123 N. E. 81 (1919).

30. Heller v. Standard Acc. Ins. Co., 118 Ohio St. 237, 160 N. E. 707, aff'd, 161 N. E. 360; Oakland Motor Car Co. v. American Fidelity Co., 190 Mich. 74, 155 N. W. 729 (1916); Chapin v. Ocean Accident & Guarantee Corporation, 96 Neb. 218, 147 N. W. 465 (1914)), 52 L. R. A. (N. S.) 227; General Accident Fire & Life Assur. Corp. v. Butler's Ice Cream Factory (Tex. Civ. App.), 291 S. W. 674 (1927), aff'd (Comm'n of App. of Tex.) 5 S. W. (2nd) 976 (1928).

statement, plaintiff did not notify defendant, and plaintiff heard nothing further about the collision until on or about February 22, 1912, when he was advised that Lewis was suffering from a species of paralysis, and claimed that his condition was traceable to the fall upon his colliding with plaintiff's automobile. Plaintiff immediately notified the defendant fully concerning the matter. About August 1, 1912, Lewis died of a disease alleged to have resulted from the fall. An administratrix brought suit against plaintiff. The insurer refused to defend on the ground that the assured failed to give immediate notice as provided for by the policy. Judgment, by agreement, was entered against plaintiff for the sum of $2,500, and he thereupon brought suit against the insurer to recover the amount, attorney fees, and costs. Said the court: "We cannot say as a matter of law that the conditions attending the accident were such as to bring it within the class of which it was his duty to give notice, or that the notice he did give was not given within a reasonable time considering all the circumstances of the case." [31]

The rule was also laid down in a Washington case that the insured is not required to give written notice where after an accident he has no knowledge that an injury has occurred or that he is charged with liability. At the time of the accident the person injured stated that he was not hurt and that it was his fault. The insured had no further information or knowledge of the accident until suit was instituted and summons was served upon him. The insured's rights to recover under the policy were not forfeited by reason of his failure to notify the company at the time of the accident.[32] In the New York case of *Melcher v. Ocean Accident & Guarantee Corporation*, the plaintiff heard that an outside workman employed in repairing his building had been struck by an elevator. He immediately

31. Chapin v. Ocean Accident & Guarantee Corporation, Ltd., 96 Neb. 213, 147 N. W. 465 (1914), 52 L. R. A. (N. S.) 227.

32. McKenna v. International Ind. Co., 125 Wash. 28, 215 Pac. 66 (1923).

investigated the matter. He saw the workman and was told by him that while he was at work in the shaft the car had struck him and raised him about a foot. He said that he was not hurt at all, and as a matter of fact he continued at work for the rest of the day. The insured never heard anything more of the accident, and had no reason to expect serious results. Some ten weeks later he was informed that the workman's spine had been seriously injured. Under such circumstances, the court held that notice to the insurer was not necessary.[33]

§ 824. Newspaper notice.

ONE RECEIVING NOTICE THROUGH THE NEWSPAPERS OF INJURY BY THE DRIVER OF HIS AUTOMOBILE, WHO, WITHOUT INVESTIGATION, RESTS UPON THE DRIVER'S ASSURANCE THAT THE INJURY WAS TRIVIAL, IS NOT RELIEVED FROM COMPLIANCE WITH THE REQUIREMENT OF HIS INDEMNITY POLICY THAT IMMEDIATE NOTICE OF ACCIDENTS BE GIVEN TO THE INSURER.

The New York court distinguished the Haas Tobacco Company case from the Melcher case. In the former case, the plaintiff had a policy of automobile insurance issued by the defendant to protect it against accidents caused by its automobiles, containing the usual clause for immediate notice. It was conceded that on January 20, 1913, one of its machines ran into and struck Joseph Bolger, causing him injuries which subsequently resulted in a judgment in his favor for over four thousand dollars. Notice of this accident was not given until some ten days later, and the defense was based upon the alleged breach of the condition with regard to notice. The trial judge charged the jury that the plaintiff could not be required to give notice if it had no knowledge of the accident itself, and further that, even if it had knowledge of the occurrence, it was not called upon to report if the circumstances were such as would not call upon a reasonably prudent person to anticipate that they might be the basis for a claim under the policy. Under

33. Melcher v. Ocean Accident & Guarantee Corporation, 226 N. Y. 51, 123 N. E. 81 (1919).

this charge the jury found a verdict for the plaintiff. The judgment entered upon this verdict, however, was reversed by the appellate division, and the complaint dismissed. Having seen in a newspaper a statement that a Haas automobile had hit a boy, the manager of the plaintiff, on the morning of the 21st, asked the driver with regard to it. He replied that "it didn't amount to anything." He was driving into a garage, and the boy ran out from the curb and struck the machine and he was knocked down. The manager asked if the boy was hurt. The driver replied: "Only slightly, for I brushed off his clothes and he went away. There was a policeman right there. It wasn't necessary to report any accident. I don't think it amounts to much." The court said: "The ruling in the Melcher case is not to be extended. Under the peculiar circumstances there disclosed, and in view of the full investigation made, it might fairly be said that a reasonable man was justified in believing the occurrence so trivial that no report was required. But where, as here, a boy is knocked down in the street, and at least slightly injured, the insured may not, without any investigation whatever, rely soley upon his own opinion or upon the opinion of his driver that because he went away the injury was too trivial to require attention." [34]

§ 825. Notice to broker.

NOTICE TO BROKER IS SUFFICIENT WHERE BECAUSE OF HABIT OR CUSTOM THE BROKER IN FACT, IF NOT IN NAME, IS AGENT OF INSURER.

The provision of the automobile liability insurance policy that immediate written notice shall be given the company in case of accident may be complied with by the giving of such a notice to the broker through whom the insured had negotiated with the company for insurance business, even though the broker is not an agent of the company, where because of habit or custom the broker is in fact if not in

34. Haas Tobacco Company v. American Fidelity Company, 226 N. Y. 343, 123 N. E. 755 (1919), aff'g 178 App. Div. 267, 165 N. Y. S. 230.

name the company's agent. Thus it has been held in an Illinois case that where the insured negotiated with the company through a broker for his insurance, it was the custom of the insured to give notice to the broker, and for the broker to transmit such notice to the company, and after the broker finally transmitted the notice to the company it did not repudiate liability, but wrote the broker for further information which was given, and where there was an opportunity to settle the case, but the insurer refused for a period of six weeks to either accept or disclaim liability, and until after the injured party refused to settle for the amount determined upon, there was compliance by the insured with the terms and conditions of the policy.[35]

§ 826. Notice not necessary where insurer is party to suit.

Where vendee instituted an action against his vendor on an alleged oral contract of public liability insurance, notice of the accident was unnecessary, for it appeared that the vendor was a party to the action that was instituted against the vendee by the injured person.[36]

§ 827. Miscellaneous illustrations.

The condition requiring immediate written notice is broken when the only notice by the assured is an oral notice over the telephone.[37]

Where insured ran an automobile into a ditch and seriously injured a person, he should have given immediate written notice to insurer.[38]

A failure to give notice of an accident for more than fourteen months after its occurrence is fatal to a recovery thereon.[39]

35. Boston Store v. Hartford Acci. & Ind. Co., 227 Ill. App. 192 (1922).

36. Ford v. Stevens Motor Car Co., 203 Mo. App. 669, 220 S. W. 980 (1920).

37. Farrell v. Merchants Mut. Auto. Liab. Ins. Co., 203 App. Div. 118, 196 N. Y. S. 383 (1922).

38. Weiss v. New Jersey Fidelity & Plate Glass Ins. Co., 228 Misc. Rep. 836.

39. Overland Sales Co. v. American Ind. Co. (Tex. Civ. App.), 256 S. W. 980 (1924).

The assured was not relieved from complying with the provision requiring "immediate notice" of an accident where both its inspector, superintendent of mechanical parts and head tester of the assured company had notice of an accident and injuries and of the claim of the injured person, within a few days after the statements of company's testers that no accident occurred. The assured was located within thirty miles of the insurer's office, with modern means of communication accessible, but gave no notice until three months after the accident.[40]

§ 828. Notice as affecting rights of injured claimant.

INJURED PERSON WHO IS A JUDGMENT CREDITOR HAS RIGHT OF RECOVERY AGAINST INSURER EVEN THOUGH ASSURED DID NOT GIVE REQUIRED NOTICE.

Where the liability policy inures to the benefit of persons damaged "regardless of any of the conditions of the policy", the injured person who is a judgment creditor of the insured has a right to recover from the insurer the amount thereof notwithstanding insured's failure to furnish the prescribed notice of the accident or the failure of the injured person to give insurer such notice.[41]

Where the policy provides that the "failure of the assured to comply with the requirements of the policy shall not prejudice the right of any person other than the assured to recover hereunder," there is no obligation on the part of the injured person to give notice to the insurer of the institution of an action against the insured.[42] Failure of the insured to notify the insurance company of the pendency of an action against him by the person injured as the result of insured's negligent operation of an automobile does not

40. Oakland Motor Co. v. American Fidelity Co., 190 Mich. 74, 155 N. W. 729 (1916).

41. Arizona Mut. Auto. Ins. Co. v. Bernal, 23 Ariz. 276, 203 Pac. 338 (1922).

42. Devlin v. N. Y. Mut. Casualty Taxicab Ins. Co., 123 Misc. 784, 206 N. Y. S. 365, aff'd with modifications, 213 App. Div. 152, 210 N. Y. S. 57.

impair the right of the injured person to recover from the insurer.[43]

But where the insurer reserved its right under the policy agreement as to notice, it has a right to assert such a right in an action by the injured person against it.[44]

In an action on a liability policy obtained in pursuance of city ordinance in the state of Ohio, where the ordinance provided that in the event of an unsatisfied execution, the injured person might maintain an action against the insurance company direct under the terms of the policy, the insurer had a right to defend the action against it by the injured party on the ground that the assured had not given the insurer notice of the accident as provided for by the terms of the policy.[45]

The defense that notice of the accident was not given as required by the policy is available to the insurer in an action by the injured person where it was and could not have been set up as a defense in the action by the injured person against the assured.[46]

§ 829. Pleading.

Where the injured party recovers a judgment against the insured, and institutes an action on the judgment against the insurer, he may avail himself of the waiver of the breach of the policy agreement as to the giving of written notice of the accident without pleading it.[47]

§ 830. "Loss"—Construed.

"LOSS" WHERE USED IN THE POLICY IN CONNECTION WITH IMMEDIATE WRITTEN NOTICE MEANS THE INJURY OR DAMAGE CAUSED BY THE ACCIDENT.

43. Finkelberg v. Continental Cas. Co., 126 Wash. 543, 219 Pac. 12 (1923).
44. Hermance v. Globe Indemnity Co., 221 App. Div. 394, 223 N. Y. S. 93 (1927).
45. United States Casualty Co. v. Breese, 21 Ohio App. 521, 153 N. E. 206 (1925).
46. Stacey v. Fidelity & Casualty Co., 21 Ohio App. 70, 152 N. E. 794 (1926).
47. Miller v. Union Ind. Co., 209 App. Div. 455, 204 N. Y. S. 730 (1924).

The word "loss" in the policy where used in connection with immediate written notice of the accident means the injury or damage caused by the accident for which the insurer may be liable under the terms of the policy, even though the extent of the loss may not be known at the time. So, where the liability policy provides for immediate notice of "an accident or loss" and "the fullest information obtainable at the time", the assured is required to give immediate notice of the injuries or damage caused by the accident as well as of the accident itself, and can not defer such notice to the time fixed for giving notice of the injured party's claim of loss.[48]

§ 831. Statute.

Where policy provision for giving notice is contrary to the statute, it is in operative. Thus, in a Wisconsin case it was held that where policy required that notice should be given within five days of an accident, as the provision was contrary to statute, it was void. Insurer was not prejudiced by two months' delay in giving notice.[49]

§ 832. Waiver. (a) In general.

The provision of the automobile liability insurance policy that the insured shall give immediate "written notice" to the company may be waived, expressly, by agreement, or impliedly, by conduct of the insurer.[50]

48. Lewis v. Commercial Casualty Ins. Co., 142 Md. 472, 121 Atl. 259 (1923).

49. Corwin v. Salter, 194 Wis. 333, 216 N. W. 654 (1927).

50. Lee v. Casualty Co. of America, 90 Conn. 202, 96 Atl. 952 (1916); Di Francesco v. Zurich General Accident & Liability Ins. Co., Ltd., 105 Conn. 162, 134 Atl. 789 (1926); Meyer v. Iowa Mutual Liability Ins. Co., 240 Ill. App. 431 (1926); Boston Store v. Hartford Accident & Indemnity Co., 227 Ill. App. 192 (1922); Dennis Sheen Transfer v. Georgia Casualty Co., 163 La. 969, 113 So. 165 (1927); London & Lancashire Indemnity Co. v. Cosgriff, 144 Md. 660, 125 Atl. 529 (1924); Miller v. Union Indemnity Co., 209 App. Div. 455, 204 N. Y. S. 730 (1924); Farrell v. Merchants Mutual Automobile Liability Ins. Co., 203 App. Div. 118, 196 N. Y. S. 383 (1922); Rosenberg v. Maryland Casualty Co., 3 N. J. Misc. 1132, 130 Atl. 726 (1925); Reilly v. Linden, 151 Minn. 1, 186 N. W. 121 (1921).

§ 833. Waiver. (b) Waiver clause construed.

Immediate written notice of an accident may be wholly waived though the policy contains a clause providing that no officer, agent or other representative shall have power to waive any condition except such as may be indorsed thereon or added thereto, for such non-waiver clause has no reference to stipulations which are to be performed after a loss, such as giving notice of an accident.[51]

For example, the provision of the policy requiring written notice is waived where, after receiving an insufficent notice of loss, the insurer examines the claim and refuses to pay it, but exclusively for other reasons than the insured's failure to give written notice of the accident.[52] A claims manager or agent with general authority may waive the provision of the policy requiring notice of loss.[53]

§ 834. Waiver. (c) Option to defend or deny liability for failure to give notice.

The insurer can assume responsibilty for the conduct of the litigation in behalf of the assured, as the conditions of the policy provide for, or it may deny any and all liability because of the failure of the assured to give immediate written notice of the accident. The insurer has the option either to refuse to defend the action, or to waive the breach of the policy condition as to notice, and conduct the defense for the assured. But it cannot do both. In the event that the insurer elects to conduct the defense for the assured, unless there is an agreement to the contrary, it waives its defense to liability on the policy for failure of the assured to give written notice of the accident.[54]

The provision requiring the assured to give immediate written notice to the insurer upon the occurrence of an acci-

51. Reilly v. Linden, 151 Minn. 1, 186 N. W. 121 (1922); Rosenberg v. Maryland Cas. Co., 3 N. J. Misc. 1132, 130 Atl. 726 (1925).

52. Rosenberg v. Maryland Cas. Co., 3 N. J. Misc. 1132, 130 Atl. 726 (1925).

53. Rosenberg v. Maryland Cas. Co., 3 N. J. Misc. 1132, 130 Atl. 726 (1925).

54. Miller v. Union Indemnity Co., 209 App. Div. 455, 204 N. Y. S. 730 (1924).

dent is waived where, without objection to the failure of the assured to give the required notice, the insurance company through its attorneys take charge of and conduct the defense in the trial between the injured party and the assured.[55]

Where the insurer knows at the time summons and complaint against assured is delivered to the company that the assured has not given the company written notice as provided for by the conditions of the liability policy, but only oral notice over the telephone, and thereafter assumes reponsibility for the defense of the action and control over the settlement thereof by taking charge of the litigation, it waives the condition of the policy requiring written notice.[56] However, the insurer has the right, under such circumstances, by agreement with the assured, to assume control over the litigation for the assured and defend the action for him, and at the same time repudiate its liability under the policy.[57] Thus, the insurer did not waiver the provision of the policy requiring immediate notice where an agreement was entered into that all acts with reference to the conduct of the defense of the case against the assured should be considered as done without prejudice to the insurer's rights under the policy.[58] So an insurer that reserves its rights is not liable under automobile liability policy to injured party, if insured failed to give immediate notice of injury.[59]

This understanding or agreement must be had before the

55. London & Lancashire Indemnity Co. v. Cosgriff, 144 Md. 660, 125 Atl. 529 (1924).

56. Farrell v. Merchants Mut. Auto. Liabilty Ins. Co., 203 App. Div. 118, 196 N. Y. S. 383 (1922).

57. Farrell v. Merchants Mutual Auto. Liabilty Ins. Co., 203 App. Div. 118, 196 N. Y. S. 383 (1922); Oakland Motor Co. v. American Fideltiy Co., 190 Mich. 74 (1916), 155 N. W. 729; Ferry v. National Motor Underwriters, 244 Ill. App. 241.

58. Oakland Motor Co. v. American Fidelity Co., 190 Mich. 74, 155 N. W. 729 (1916).

59. Weiss v. New Jersey Fidelity & Plate Glass Ins. Co., 228 N. Y. S. 314, 131 Misc. Rep. 836 (1928).

company elects to defend the action. Notice at the time of trial by the insurer that it denies liability under the policy comes too late, when it is made months after the insurer had elected under the terms and conditions of the policy to defend the action.[60]

But it has been held that the company does not waive the breach of the policy condition as to giving immediate written notice of the accident by the insured, by requesting copy of the notice of injured party's claim and stating that the insured need not worry as the company would "look after him", when the insurer promptly notifies the insured, after examination of the claim, that it is not covered by the policy.[61]

§ 835. Waiver. (d) Pleading.

Although the plaintiff did not deny insurer's allegation that notice of the injury was not given as required by the terms of the liability policy, it was held that there might be an implied waiver, as the pleadings showed that the insurer, knowing that there had not been a strict compliance with the provision as to notice, attempted to make a settlement with the injured person over a period of two months, and later requested the papers in the action that had been instituted against the assured, and did not deny liability until shortly before trial.[62]

§ 836. Waiver. (e) Proof of notice.

In an action on an automobile insurance liability policy containing the provision that immediate written notice shall be given of any accident, it is material to allege and essential to prove that such notice was given the insurance company. Where such an allegation is contained in the declaration, and the further statement that under the terms and

60. Farrell v. Merchants Mut. Auto. Liability Ins. Co., 203 App. Div. 118, 196 N. Y. S. 383 (1922).

61. Lewis v. Commercial Cas. Ins. Co., 142 Md. 472, 121 Atl. 259 (1923).

62. Lee v. Casualty Co. of America, 90 Conn. 202, 96 Atl. 952 (1916).

conditions of the policy, the insurer took control of the litigation and defended the insured, it was necessary in the action that the insured prove the allegations, in the absence of any evidence as to waiver. If there is a denial of the allegations, and the insured fails to prove them, it is error for the court to refuse a directed verdict for the insurer.[63]

§ 837. Waiver. (f) Burden of proof.

Under an automobile indemnity policy, the burden of proving impossibility of notifying insurer of suit or due diligence in giving notice is on the assured.[64]

E. AGREEMENT TO DEFEND.

IT IS THE DUTY OF INSURER TO DEFEND EVERY ACTION IN WHICH THE COMPLAINT SHOWS A CLAIM FOR DAMAGES COVERED BY THE POLICY.

COROLLARY. DUTY OF INSURER TO DEFEND DOES NOT DEPEND UPON THE OUTCOME OF THE ACTION BROUGHT TO ENFORCE THE CLAIM.

§ 838. In general.

The automobile liability policy usually provides that "if any suit, even if groundless, is brought against the insured to recover damages on account of injuries or death covered by this policy * * * the company will, at its own cost and expense, defend such suit in the name and on behalf of the assured." Under such a provision of the policy, it is the duty of the insurer to defend every action in which the complaint shows a claim for damages covered by the policy. The duty to defend does not depend upon the outcome of the action brought to enforce the claim.[65]

63. Bradley v. Ill. Auto. Ins. Exch., 227 Ill. App. 572 (1923).

64. Heller v. Standard Accident Insurance Co., 118 Ohio St. 237, 160 N. E. 707, aff'd 161 N. E. 360 (1928).

65. Greer-Robbins Co. v. Pacific Surety Co., 37 Cal. App. 540, 174 Pac. 110 (1918).

§ 839. Criminal suits not included.

Where the policy indemnifying against liability imposed by law by reason of the maintenance and use of any automobile provides that the insurer will "defend in the name and on behalf of the assured any suits which may at any time be brought against him on account of such injuries", the word "suits" does not include criminal prosecution against the assured.[66]

§ 840. Refusal to defend.

REFUSAL. WHERE INSURER UNJUSTIFIABLY REFUSES TO DEFEND ACTION AGAINST THE ASSURED, THE CONTRACT IS BREACHED, AND ASSURED IS RELEASED FROM AGREEMENT NOT TO SETTLE WITHOUT ACTUAL TRIAL.

WAIVER. UNDER SUCH CIRCUMSTANCES, THE PROVISION OF THE POLICY THAT THE INSURER IS ONLY LIABLE TO THE ASSURED FOR ACTUAL PAYMENT OF MONEY RESULTING FROM THE RECOVERY OF A JUDGMENT AGAINST THE ASSURED IS WAIVED, AND THE ASSURED CAN THEN RECOVER ON THE POLICY WITHOUT PROVING PAYMENT OF THE JUDGMENT.

Where the insurer wrongfully refuses to defend an action against the assured as provided for by the indemnity policy, there is a breach of the contract, and the insurer thereby renders itself liable to the insured.[67]

The insurer, after it has refused to defend an action instituted against the assured arising under the policy, cannot thereafter invoke the provision of the policy that the assured has no right to make settlement thereof. The insurer, having breached the warranty of the policy to defend, the assured has a right, then, to defend the action on his own account, and the insurer becomes liable for the expenses of

66. Patterson v. Standard Acc. Ins. Co., 178 Mich. 288, 144 N. W. 491, 51 L. R. A. (N. S.) 583, Ann. Cas. 1915A, 632 (1913).

67. Belt Auto. Indem. Ass'n v. Ensley Transfer & Supply Co., 211 Ala. 84, 99 So. 787 (1924); Mayor, Lane & Co. v. Commercial Casualty Ins. Co., 169 App. Div. 772, 155 N. Y. S. 75 (1915); Juszkiewicz v. New Jersey Fidelity & Plate Glass Ins. Co., 210 App. Div. 675, 206 N. Y. S. 566 (1924); Western Indem. Co. v. Walker-Smith Co. (Tex. Civ. App.), 203 S. W. 93 (1918); Combs v. Hunt, 140 Va. 627, 125 S. E. 668, 37 A. L. R. 621 (1924).

the litigation and the amount of the settlement, provided it is paid in good faith and arose under the policy.[68]

§ 841. Election to defend.

An indemnity insurer whose contract excluded the assured from participation in the defense or settlement of any claim against him cannot, after settling some of the claims growing out of an accident and undertaking the defense of a suit on other claims, withdraw from the defense and cast the burden thereof on the assured on the theory that it had mistaken the nature of its obligation.[69]

§ 842. Assured may make setlement.

When an action is instituted against the insured growing out of an accident connected with the insured automobile, upon proper notice the insurer may, in compliance with the terms of the policy, defend the action in behalf of the assured, or it may elect to deny liability. By denying liability or refusing to settle claims against insured, which are covered by the automobile indemnity policy, the insurance company commits a breach of the policy contract and thereby waives the provisions defining the duties and obligations of the insured. Thereafter, the insured may properly assume responsibility for the conduct of his own defense of the case, and may either continue the litigation and go to trial with the case, or if his judgment so dictates, he may make a reasonable settlement of the claim. Under such circumstances, he may recover from the company the amount which he is reasonably required to effect the settlement as damages ordinarily and naturally resulting from the insurer's failure to defend the action.[70]

68. Mayor, Lane & Co. v. Commercial Casualty Ins. Co., 169 App. Div. 772, 155 N. Y. S. 75 (1915).

69. Fullerton v. United States Casualty Co., 184 Iowa 219, 167 N. W. 700, 6 A. L. R. 368 (1918).

70. Independent Milk & Cream Co. v. Aetna Life Ins. Co., 68 Mont. 152, 216 Pac. Rep. 1109 (1923).

"It would certainly seem logical and more in consonance with the true intent of the stipulations of the policy", says the Virginia court in the Combs case, "to hold that a refusal on the part of the company to defend a suit against the assured constitutes a breach of its contract and makes it liable to the assured for the damages he may suffer, whether such damages be measured by a judgment against him or a voluntary settlement which the assured is forced to make." [71]

§ 843. Settlement without judgment.

An indemnity insurer which abandons its obligation to defend a suit against assured growing out of an accident cannot defeat a recovery for money paid by the assured in settlement of the claim on the ground that it was paid in compromise without a judgment, even though the contract provided for recovery only when the payment is in satisfaction of a judgment.[72]

§ 844. Waiver.

Where the insurer wrongfully refuses to defend an action against the assured as provided for by the accident indemnity policy, there is such a breach of the contract as even waives the provision that the insurer is only liable to the assured for actual payment of money resulting from the recovery of a judgment against the assured.[73] Thus, on an automobile indemnity policy where the insurance company refused to defend and the court thereafter held that it was the duty of the insurer to defend the assured under its policy, the assured could recover on the policy without pro-

71. Combs v. Hunt, 140 Va. 627, 125 S. E. 661, 37 A. L. R. 621 (1924); See Independent Milk & Cream Co. v. Aetna L. Ins. Co., 68 Mont. 152, 216 Pac. 1109; Klotzbach v. Bull Dog Automobile Fire Association (Mo. App.), 267 S. W. 39 (1924).

72. Fullerton v. United States Casualty Co., 184 Iowa 219, 167 N. W. 700, 6 A. L. R. 368 (1918).

73. Empire State Surety Co., Matter of, 214 N. Y. 533, 108 N. E. 825 (1915).

ving payment of the judgment.[74] This rule would seem to be supported not only by reason, but also by authority.[75]

§ 845. Reserving question of liability.

INSURER MAY UNDER EXPRESS CONDITION OF POLICY RESERVE QUESTION OF LIABILITY, EVEN THOUGH IT DEFENDS ACTION AGAINST ASSURED.

Where the insurer undertakes the defense of the action instituted against the insured under an agreement by and between the insured and the attorney for the insurance company that the insurer has undertaken the defense of the action with the reservation of policy rights, such an agreement was construed to mean that the insurer, in so assuming the defense of the action against the insured, did not waive any of its rights under the policy or assume any greater liability than the policy provided for.[76]

§ 846. Laches.

An insurance company, with the express or implied consent of the assured, may undertake to assume the defense of an action for the assured and reserve its right to repudiate liability under its contract, but where such reservation of right made at the time of complaint filed and service of summons is not brought to the attention of the assured until the eve of trial, nearly nine months after the company

74. Juszkiewicz v. New Jersey Fidelity & Plate Glass Ins. Co., 210 App. Div. 675, 206 N. Y. S. 566 (1924).

75. United States Fidelity & G. Co. v. Williams (1925), 148 Md. 289, 129 Atl. 660; Bess v. Commonwealth Casualty Co., 101 N. J. L. 380, 128 Atl. 250 (1925); Miller v. Union Indemnity Co. (1925), 209 App. Div. 455, 204 N. Y. Supp. 730; Devlin v. New York Mut. Casualty Taxicab Ins. Co. (1924), 123 Misc. 784, 206 N. Y. Supp. 365, affirmed, with modifications (1925), 213 App. Div. 152, 210 N. Y. Supp. 57; Bell v. Weiner (1925), 46 R. I. 478, 129 Atl. 339; American Auto. Ins. Co. v. Struwe (1920) (Tex. Civ. App.), 218 S. W. 534; Finkelberg v. Continental Casualty Co. (1923), 126 Wash. 543, 219 Pac. 12; Merchants Mut. Auto. Liability Ins. Co. v. Smart (1925), 267 U. S. 126, 69 L. Ed. 538, 45 Sup. Ct. Rep. 320; Dickinson v. Maryland Casualty Co., 101 Conn. 369, 125 Atl. 866 (1924).

76. Hartigan v. Casualty Co. of America, 97 Misc. 464, 161 N. Y. S. 145 (1916).

had assumed charge of the litigation for the assured, it was too late.[77]

§ 847. Knowledge.

IT IS A GENERAL RULE THAT THE INSURER BY DEFENDING THE ASSURED, DOES NOT WAIVE ANY DEFENSE TO LIABILITY UNDER THE POLICY WITH WHICH IT DOES NOT HAVE KNOWLEDGE AT THE TIME.

The insurer, by undertaking the defense of an action against insured, does not, generally speaking, waive any defense to liability under the policy which it does not have knowledge of at the time. So, where the insurer undertakes defense of the action for the insured and itself as garnishee, and it develops during the trial and thereafter facts are disclosed to the insurance company that the insured was intoxicated at the time of the accident, insurer is not thereafter estopped from denying liability where intoxication of the insured at the time of the accident under a provision of the policy exempts the insurer from liability.[78] But, where the insurer elects to defend an action against the insured imposed by the Employers' Liability Act, has knowledge at the time of so doing that under the terms of the policy the insurance company is exempt from liability for such losses, induces the insured not to employ other counsel and advises the insured against settling the action for a much lesser amount than the judgment that was subsequently recovered against the insured, it is thereafter estopped from standing on the terms of the policy and denying liability.[79]

It was held in a New York case where the insurance company undertook the defense of the action against the assured until it learned the chauffeur was under eighteen years of age, there was no waiver of the insurer's right to

77. Farrell v. Merchants Mutual Auto. Liabilty Ins. Co., 203 App. Div. 118, 196 N. Y. S. 383 (1922).

78. Humphrey v. Polski, 161 Minn. 61, 200 N. W. 812 (1924).

79. Belt Auto. Indem. Ass'n v. Emsley Transfer & Supply Co., 211 Ala. 84, 99 So. 787 (1924).

stand upon the provisions of its policy and disclaim liability.[80]

§ 848. Malpractice as defense.

Where the insurer has defended the action against the insured for death resulting from the operation of insured's machine, it is no defense to an action instituted by the insured on the policy for recovery of the amount of the judgment which he has paid that the death was the result of malpractice of the attending physician rather than the negligence of the insured.[81]

§ 849. Insurer's liability for failure to defend.

INSURER IS LIABLE IN DAMAGES TO THE ASSURED FOR FAILURE TO DEFEND ASSURED AGAINST ACTIONS INSTITUTED AGAINST HIM UNDER THE POLICY.

Insured can enforce or hold the insurer in damages for breach of provision of automobile liability policy which binds it to defend actions against insured for injuries alleged to have been sustained by third persons as the result of insured's alleged negligent operation of his automobile.[82] Failure on the part of the insurer to defend will render it liable for the costs and expenses which the assured may incur in defending the action.[83]

§ 850. Liability fixed by amount of policy.

Even though the insurer fails and refuses to perform its plain duty under the policy and defend an action arising thereunder instituted against the assured, its liability is limited to the amount specified in the policy. For example, in a Minnesota case, the policy provided that the liability of the insurer was limited to $5,000 for injury to or death

80. Morrison v. Royal Indem. Co., 180 App. Div. 709, 167 N. Y. S. 732 (1917).

81. Taxicab Motor Co. v. Pacific Coast Casualty Co., 73 Wash. 631, 132 Pac. 393 (1913).

82. Fentress v. Rutledge, 140 Va. 685, 125 S. E. 668 (1925).

83. Greer-Robbins Co. v. Pacific Surety Co., 37 Cal. App. 540, 174 Pac. 110 (1918).

of one person, and, subject to that limit, to $10,000 for injury to or death of more than one person. Suits were begun by two injured claimants against assured, and the insurer refused to defend. Judgments were rendered for $12,633.62 and $2,630.73, respectively. The court held that the assured could not recover the balance on the second judgment up to its liability of $5,000 for the payment of assured's excess liability, over and above that amount, on the first. The limit of the insurer's liability on the policy was fixed by the terms of the policy, even though the insurer refused to defend. The court said: "The question presented is controlled by the general rule that measure of damages for the breach of a contract for the payment of money is the amount agreed to be paid, with interest. The fact in this case that defendant's obligation under the contract extended beyond the payment of the amounts stated, and included the promise to conduct the defense of the action, cannot be held to enlarge the limitation as to the amount fixed as reimbursement for injuries to persons. The failure to defend exposed defendant only to the additional liability for the cost and expense which plaintiff was put to by reason of defendant's breach of the contract in that respect. That breach clearly did not create any greater liability on the facts herein disclosed." [84]

§ 851. Liability for failure to perfect appeal.

The insurer having undertaken the defense of the action instituted against the insured, must exercise due care and diligence in discharge of such obligation, and if it fails so to do through carelessness or neglect it is liable to the insured for such damages as may result therefrom. Thus, it was held in a New York case, where judgment had been recovered against the insured, and the insurance company had agreed with the insured to perfect an appeal, and advised the insured that it had so done, but without the knowl-

84. Mannheimer Bros. v. Kansas Casualty & Surety Co., 149 Minn. 482, 184 N. W. 189 (1921).

edge of the insured permitted the time within which to take an appeal to expire without having perfected the appeal, it was liable to the insured for the amount of judgment in excess of the amount of the policy for its neglect.[85]

§ 852. Burden of proof—Evidence.

It was recognized, however, in the case supra, that the burden was on the assured of showing that had it not been for the negligence of the insurer the action against insured for recovery by claimant for the injuries would have been reversed. But the appellate court held that as there was a finding of the trial court that the insured had suffered the damage complained of and the insurer had not made a motion for non-suit, the insurer was not in a position to urge the point. The court also held that the insurer had a right to introduce evidence to show that there were no errors in the trial record that would entitle it to a new trial, but insurer had not proved that such was a fact by the burden of the evidence.[86]

§ 853. Burden of proof—Optional contract.

Under an indemnity policy which left it optional with the insurer whether or not it should defend the action, the insurer did not waive its right to raise the question of assured's liability and the reasonableness of the settlement which he made. The burden of proof was on the assured, even though the insurer elected not to defend the action.[87]

§ 854. Right to abandon—Estoppel by conduct.

When the insurer, with full knowledge of the facts, assumes responsibility for conducting the assured's defense, at its own cost, it cannot thereafter abandon the case before

85. McAleenan v. Mass. Bonding & Ins. Co., 190 App. Div. 657, 180 N. Y. S. 287 (1920), aff'd 232 N. Y. 199, 133 N. E. 444 (1921).

86. McAleenan v. Mass. Bonding & Ins. Co., 190 App. Div. 657, 180 N. Y. S. 287 (1920), aff'd 232 N. Y. 199, 133 N. E. 444 (1921).

87. Brinkman v. Western Automobile Indemnity Ass'n, 205 Mo. A. Rep. 71, 218 S. W. 944 (1920).

trial on the ground that the policy did not impose on it such a duty.[88]

§ 855. Insurer liable for court costs.

Under an automobile liability policy providing that the insurer will at its own cost and expense defend any suit against the assured arising on account of injuries covered by the policy, if the insurer fails to perform its duty and defend such an action, it is liable for the full amount of the court costs, even though the judgment is in excess of the amount of the policy, and without apportionment.[89]

§ 856. Expenses for investigation.

Likewise, the insured can recover reasonable expenses incurred in making an investigation of the facts in the case for use on the trial thereof; but employing an investigator to make a trip to another city when competent investigator could have been employed in the city to which he was sent is a needless expense, and not allowable against the insurer.[90]

§ 857. Bond and poundage fees as costs.

It has been held in a New York case that under an automobile liability policy limiting liability to $5,000 where no person is killed and obligating the insurance company to defend the suit, "pay all costs and expenses incident to the investigation, adjustment, and settlement of claims, and all costs taxed against assured in any legal proceeding defended by the insurer," the insurance company was under no obligation to pay the premium of a bond and poundage fees given by assured to the sheriff to release an attach-

88. Fullerton v. United States Casualty Co., 184 Iowa 219, 167 N. W. 700 (1918), 6 A. L. R. 367.

89. Mannheimer Bros. v. Kansas Casualty & Surety Co., 149 Minn. 482, 184 N. W. 189 (1921).

90. Western Indem. Co. v. Walker-Smith Co. (Tex. Civ. App.), 203 S. W. 93 (1918).

ment lien in an action against assured for wrongful death, particularly where the amount of the bond was $12,500.[91]

§ 858. Attorney fees.

INSURER WHICH REFUSES TO DEFEND ACTION AGAINST ASSURED IS LIABLE TO ASSURED FOR REASONABLE ATTORNEY FEES INCURRED IN DEFENSE OF THE ACTION, EVEN THOUGH ASSURED HAS NOT PAID THEM.

If the insurance company is obligated under its liability policy to defend any action instituted against the assured coming within the provisions of the policy, and neglects so to do, it is liable to the assured for such reasonable attorney fees as he may incur in properly defending the action; and that is true whether the assured has actually paid the attorney fees or not. For example, in a Texas case, the policy provided that "if any person shall obtain bodily injury by reason of the use of the automobile for which injuries the insured is, or is alleged to be, liable for damages, then the company will indemnify the insured against such liability and will pay all costs incurred with the company's written consent." The court held that the policy clearly indemnified against liability, and that where the company refused to defend an action against insured for injuries so incurred, it was liable for reasonable attorney's fees contracted by the insured and for which insured was liable, even though they had not been in fact paid.[92] The rule was applied even though the insured had not obtained the written consent of the company to incur the expense, as the policy provided. Insurer's refusal to defend was a waiver of the provision.[93]

91. Green River Distilling Co. v. Mass. Bonding & Ins. Co., 234 N. Y. 109, 136 N. E. 310 (1922), rev'g 197 App. Div. 499, 189 N. Y. S. 263 (1921) which reversed 185 N. Y. S. 307 (1920).

92. Royal Indem. Co. v. Schwartz (Tex. Civ. App.), 172 S. W. 581 (1915); Western Indem. Co. v. Walker-Smith Co. (Tex. Civ. App.), 203 S. W. 93 (1918).

93. Royal Indem. Co. v. Schwartz (Tex. Civ. App.), 172 S. W. 581 (1915).

§ 859. Exception.

But where a judgment is obtained against the assured and it is the desire of the insurer to effect a compromise agreement for payment, the assured cannot hold the insurer liable for court costs and legal expenses incident to carrying the case to the appellate court.[94]

§ 860. Private counsel.

The liability policy providing that the insurer will defend any action for the assured arising under the policy, the assured procuring counsel on his own initiative to assist the insurer's counsel, he does so at his own expense and there is no liability attaching to the insurer for reimbursing the assured for private counselor fees.[95]

§ 861. "No action clause".

The insurer, also, will be held liable for reasonable attorney fees where it refuses to defend even though the policy contains a "no action" clause.[96]

F. COOPERATION OF ASSURED.

UNDER THE PROVISION OF THE AUTOMOBILE LIABILITY POLICY PROVIDING FOR ASSURED'S COOPERATION AND ASSISTANCE, HE IS REQUIRED TO ASSIST THE INSURER IN SECURING INFORMATION, EVIENCE, AND THE ATTENDANCE OF WITNESSES IN DEFFENDING SUIT AGAINST HIM, AND IN EFFECTING SETTLEMENT.

§ 862. In general.

The automobile liability policy usually contains a provision "that the assured whenever requested by the company, shall aid in effecting settlement, securing information and evidence, and the attendance of witnesses."

§ 863. Assured's obligation to co-operate.

Under the provision of the liability insurance policy for

94. Boling v. Ashbride, 111 Okla. 66, 238 Pac. 421 (1925).
95. Boling v. Ashbride, 111 Okla. 66, 238 Pac. 421 (1925).
96. Western Indemnity Co. v. Walker-Smith Co. (Tex. Civ. App.), 203 S. W. 93 (1918).

assured's cooperation and assistance in defending any action instituted by a person who alleges that he has sustained injuries to his person or property by reason of the negligent operation of assured's automobile, the assured is bound to assist the insurer in securing information, evidence, and the attendance of witnesses in defending the suit against him, or in effecting settlement thereof.[97]

But where the liability policy contains no provision that the assured is required to cooperate with the insurer in the investigation, prosecution, or settlement of an action against him, the assured even is under no obligation to discourage a suit by his wife against him or refrain from testifying for her.[98]

§ 864. What co-operation means.

As to what cooperation means, a New York court has used this language: "While the meaning of cooperation cannot be expanded to include assistance in a sham defense, it cannot be contracted to exclude a fair statement of the facts of the case. The insurer has a right as a matter of law to know from the assured the facts upon which the insured asserts his claim, in order to determine for itself whether it should contest or attempt to settle the claim."[99]

97. United States Casualty Co. v. Drew (C. C. A. 9th Cir.), 5 Fed. (2d) 498 (1925); Guerin v. Indemnity Ins. Co. of North American, 107 Conn. 649, 142 Atl. 269 (1928); Collins' Exrs. v. Standard Accident Ins. Co., 170 Ky. 27, 185 S. W. 112, Ann. Cas. 1917D, 59; United States Fidelity & Guaranty Co. v. Williams, 148 Md. 289, 129 Atl. 660 (1925); Rohlf v. Great American Mutual Ind. Co., 27 Ohio App. 208, 161 N. E. 232; Bassi v. Bassi, 165 Minn. 100, 205 N. W. 947 (1925); Roth v. National Automobile Mutual Casualty Co., 202 App. Div. 667, 195 N. Y. S. 865 (1922); Schoenfeld v. New Jersey Fidelity & Plate Glass Ins. Co., 203 App. Div. 796, 197 N. Y. S. 606 (1922); Hermance v. Globe Indemnity Co., 221 App. Div. 394, 223 N. Y. S. 93 (1927); Conroy v. Commercial Casualty Ins. Co., 292 Pa. 219, 140 Atl. 905 (1928); Francis v. London Guarantee & Accident Co., Ltd., —— Vt. ——, 138 Atl. 780 (1927); Fentress v. Rutledge, 140 Va. 685, 125 S. E. 668 (1924); Taxicab Motor Co. v. Pacific Coast Casualty Co., 73 Wash. 631, 132 Pac. 393 (1913).

98. Maryland Casualty Co. v. Lamaree, —— N. H. ——, 140 Atl. 174 (1928).

99. Coleman v. New Amsterdam Casualty Co., 126 Misc. 380, 213 N. Y. S. 522.

What constitutes failure of cooperation is a question of fact.[1]

Where the insurer is unable to make a defense, with the expectation of a fair presentation thereof, without the cooperation of the assured, a lack of cooperation without legal excuse or collusion, and in some material respect when needed, and not waived by the insurer, is a good ground of defense.[2]

§ 865. What constitutes failure to co-operate.

Failure to cooperate or assist the insurer within the meaning of the policy provision is not shown by the testimony of insurer's attorney that the assured failed to speak to him or assist him during the trial, or to testify in his own behalf, where it was not shown that the insurer's attorney called upon the assured to assist him in any way, or requested him to testify, or that the assured could have been of any assistance. There was no evidence of bad faith or collusion because the injured claimant's attorney was the assured's brother.[3]

Where there was no bad faith or collusion, the fact that assured and person injured in his car were friends is not sufficient to prevent recovery on liability policy.[4]

Refusal of insured to execute affidavit of defense in trespass action stating that automobile trip in which injuries occurred was for pleasure only did not warrant insurer's repudiation of obligation under the policy, where it was nonprejudicial.[5]

1. Metropolitan Casualty Ins. Co. v. Blue, —— Ala. ——, 121 So. 25 (1929).
2. Metropolitan Casualty Ins. Co. v. Blue, —— Ala. ——, 121 So. 25 (1929); New York Consolidated R. Co. v. Mass. Bonding & Ins. Co., 193 App. Div. 438, 184 N. Y. S. 243; United States Fidelity & Guaranty Co. v. Williams, 148 Md. 289, 129 Atl. 660 (1925); Bradley v. Illinois Automobile Ins. Exchange, 227 Ill. App. 572 (1923).
3. United States Casualty Co. v. Drew (C. C. A. 9th Cir.), 5 Fed. (2d) 498 (1925).
4. Conroy v. Commercial Casualty Ins. Co., 292 Pa. 219, 140 Atl. 905 (1928). (1928).
5. Conroy v. Commercial Casualty Ins. Co., 292 Pa. 219, 140 Atl. 905 (1928).

But the liability policy is avoided where assured refuses to give information for defense, absents himself, or makes deliberate misstatement in collusion with the injured claimant.[6]

§ 866. Prosecution of assured's action.

Under the clause of the liability policy providing for assured's cooperation and assistance, the assured who had instituted an action against the injured claimant in a different jurisdiction from that in which the injured claimant sued the assured, both cases arising out of the same collision, was under no obligation to bring his action to trial before that of the injured claimant's suit against him because it was the desire of the insurer. The insurer wanted to have the advantage possibly of a decision favorable to the assured.[7]

§ 867. Refusal of assured to defend on ground of contributory negligence.

In an action by assured's sister against her for injuries received while she was riding with assured as her guest, the assured did not violate the provision of the policy requiring her co-operation because assured refused to permit the insurer to set up the defense of contributory negligence, where there was no evidence of contributory negligence. Assured's chauffeur had driven the injured claimant to the place where she had directed him to go, but the car skidded in leaving the place, resulting in injury to claimant. The court ruled that the chauffeur was the agent of the assured, and the relationship was not changed because the chauffeur acted in accordance with claimant's direction.[8]

6. Conroy v. Commercial Casualty Ins. Co., 292 Pa. 219, 140 Atl. 905 (1928).
7. Utterback-Gleason Co. v. Standard Accident Ins. Co., 179 N. Y. S. 836 (1920).
8. Collins' Exrs. v. Standard Accident Ins. Co., 170 Ky. 27, 185 S. W. 112, Ann. Cas. 1917D, 59.

§ 868. Discrepancy in statement.

Assured, under indemnity policy, did not breach condition of the policy, that he would "render to the company all cooperation and assistance in his power," by first making a statement to defendant insurance company's agent and thereafter repudiating it and giving evidence on the trial which conflicted with his previous statement.[9]

Lack of cooperation was not proved because insolvent assured signed a written statement to the insurance company that the chauffeur had taken his car without permission, and thereafter signed a statement for plaintiff's attorneys that he gave the chauffeur permission to take the car, but on the trial of the action for negligence, assured repeated the statements contained in the paper signed by him for the insurance company. It did not appear on the trial which statement was true, or under what circumstances the statements were prepared and signed.[10]

§ 869. Mistake.

Provision of policy is not violated because one of assured's officers testified at coroner's inquest that he gave certain instructions to driver of the car, and at the trial of the damage suit for the negligent killing of a person, he gave different testimony, where it appeared that the officer had not wilfully testified falsely at the inquest and his testimony was nothing more than a mistake, and that it in no way affected the verdict.[11]

§ 870. Error.

Where the insurer with knowledge of the assured's failure to cooperate and assist, as required by the terms of the policy, thereafter defended the action, it waived the provi-

9. Guerin v. Indemnity Ins. Co. of North America, 107 Conn. 649, 142 Atl. 269 (1928).

10. Roth v. National Automobile Mutual Casualty Co., 202 App. Div. 667, 195 N. Y. S. 865 (1922).

11. Taxicab Motor Co. v. Pacific Coast Casualty Co., 73 Wash. 631, 132 Pac. 393 (1913).

sion and could not rely upon the forfeiture. Under the circumstances, any error of the trial court in not finding that the assured failed to cooperate with the insurer was harmless.[12]

§ 871. Assured insolvent.

Where assured is insolvent and an action lies against the insurer under insolvency statute of New York insurance laws, failure of the assured to cooperate with the insurer in defending the action against assured by injured claimant, where the policy contains a provision for such assistance, is a good defense, in the absence of bad faith or evidence of collusion.[13]

But it has been held that where the liability policy provided that in case of insolvency of the assured "then an action may be maintained by the injured person against the company under the terms of the policy for the amount of the judgment not exceeding the amount of the policy", the injured claimant had a right to sue the insurance company regardless of any failure on the part of the assured to comply with the condition of the policy requiring the assured's cooperation and assistance.[14]

§ 872. Waiver.

In a Virginia case, the indemnity policy required assured to forward to the company all processes, pleadings, etc., relating to any claim against him. It also provided that the company could deny liability on the ground that assured had not furnished process, etc., to it. Before any suit was brought the company allowed the general defense of the assured against a claim for injury to be placed in its hands. The company learned of the pending action and knew that

12. Francis v. London Guarantee & Accident Co., Ltd., —— Vt. ——, 138 Atl. 780 (1927).

13. Schoenfeld v. New Jersey Fidelity & Plate Glass Ins. Co., 203 App. Div. 796, 197 N. Y. S. 607 (1922).

14. Metropolitan Casualty Ins. Co. of New York v. Albritton, 214 Ky. 16, 282 S. W. 187 (1926).

it had not received process and should then have denied liability, but it held back from its duty to defend without assigning any reason for so doing. It was held that, under such circumstances, the company could not rely upon the failure of the insured to deliver it the process or pleading in the case, for there was a clear waiver of the right to so do.[15]

Where the assured fails to furnish names and addresses of witnesses, whether or not it was prejudicial, the insurer waives the provision for assured's cooperation and assistance by defending the action. The rule is not otherwise even though the assured refused to stipulate that the insurer's conduct of the defense should not be taken as a waiver of the provision.[16]

§ 873. Jury.

Where there was a conflict in the evidence as to whether or not the insured did everything necessary to aid the insurer in defending a damage suit which had been instituted against him by one who had been injured by his truck it was a proper question for submission to the jury.[17]

G. SETTLEMENT.

UNDER THE TERMS OF AUTOMOBILE INDEMNITY POLICY PROVIDING THAT THE INSURER WILL NOT BE RESPONSIBLE FOR ANY SETTLEMENT MADE BY THE ASSURED, UNLESS IN WRITING, ETC., THE INSURER IS UNDER NO OBLIGATION TO SETTLE AN ACTION WITHOUT TRIAL, EVEN THOUGH IT MAY CONSIDER THE ASSURED IS LIABLE AND THAT THE OFFER OF SETTLEMENT SHOULD BE ACCEPTED.

WHEN, UNDER SUCH CIRCUMSTANCES, JUDGMENT IS RENDERED GREATLY IN EXCESS OF THE AMOUNT OFFERED IN SETTLEMENT, THE INSURER INCURS NO ADDITIONAL LIABILITY OTHER THAN THE FACE AMOUNT OF POLICY.

WHERE THE LIABILITY MAY EXCEED THE FACE OF THE POLICY,

15. Fentress v. Rutledge, 140 Va. 685, 125 S. E. 668 (1925).

16. Miller v. Union Indemnity Co., 209 App. Div. 455, 204 N. Y. S. 730 (1924).

17. Ems v. Continental Automobile Insurance Ass'n (Mo. App.), 284 S. W. 824 (1926).

THE ASSURED HAS A RIGHT TO PROTECT HIMSELF AGAINST ANY EXCESS LIABILITY WITHOUT CONSULTING THE INSURER, IF THERE IS NO PROVISION IN THE POLICY PRECLUDING SUCH A SETTLEMENT.

ASSURED WHO SETTLES WITH INJURED PERSON WITHOUT THE CONSENT OF INSURER AND CONTRARY TO THE PROVISIONS OF THE POLICY RELEASES THE INSURER FROM LIABILITY.

ASSURED HAS A RIGHT TO MAKE SETTLEMENT OF ACTION WHERE INSURER IN DIRECT VIOLATION OF THE TERMS AND CONDITIONS OF THE POLICY REFUSES TO DEFEND.

CLAUSE DOES NOT APPLY WHERE THE CLAIMANT HAS OBTAINED JUDGMENT AGAINST ASSURED IN AN ACTION DEFENDED BY INSURER, WHEN TIME FOR PERFECTING APPEAL HAS EXPIRED.

§ 874. In general.

The automobile public liability and property damage insurance policy usually contains the provision that "the assured shall not voluntarily assume any liability nor shall the assured, without the written consent of the corporation previously given, incur any expense or settle any claim except at his own cost or interfere with any negotiation for settlement or any legal proceeding, except that the assured may provide at the corporation's expense at the time of the accident such immediate surgical relief as is imperative."

§ 875. Insurer is under no obligation to settle.

Under the terms of automobile indemnity policy providing that the company will not be responsible for any settlement made by the insured, unless in writing, the insurer is under no obligation to settle an action without trial, even though it may consider that the insured is liable and that the offer of settlement should be accepted.[18] Where the insurer acts in good faith, it is not required to settle even though knowing verdict may exceed the amount of the policy.[19]

18. Auerbach v. Maryland Casualty Co., 236 N. Y. 247, 140 N. E. 577 (1923), rev'g 199 N. Y. S. 351, 205 App. Div. 131.

19. G. A. Stiwers Furniture Co. v. American Indemnity Co. (Tex. Civ. App.), 295 S. W. 257.

§ 876. Liability limited to face amount of policy.

As the indemnity policy does not contain any provision obligating the company to settle the action, it incurs no additional liability other than the face amount of the policy, when, under such circumstances, judgment is rendered greatly in excess of the amount offered in settlement.[20]

For example, a leading case on the liability of an insurance company where it refused to make settlement, for any excess amount of the judgment over the face of the policy, is the Pennsylvania case of *Schmidt & Sons v. Travelers' Insurance Co.* The defendant issued to the plaintiff a policy to indemnify it to the extent of $5,000 against loss by reason of liability imposed by law upon the assured for damages on account of bodily injuries accidentally suffered by any person by the maintenance and use of certain automobiles specified in the policy. The policy provided: "F. The assured, upon the occurrence of an accident, shall give immediate written notice thereof to the company, or to its duly authorized agent, with the fullest information obtainable. He shall give like notice, with full particulars, of any claim made on account of such accident. The assured shall not voluntarily assume any liability or settle any claim, except at his own cost, nor incur any expense, nor interfere in any negotiation for settlement or legal proceeding, without the consent of the company previously given in writing.

"G. If thereafter any suit, even if groundless, is brought against the assured to assured to recover damages on account of such injuries as are covered by this policy, the assured shall immediately forward to the company every summons or other process served upon him, whereupon the company will, at its own cost, defend against such suit in the name and on behalf of the assured. The company shall not be liable hereunder on account of one person or one accident in excess of the limits of liability applicable thereto as expressed in said declarations, except for the expense

20. Auerbach v. Maryland Casualty Co., 236 N. Y. 247, 140 N. E. 577 (1923), rev'g 199 N. Y. S. 351, 205 App. Div. 131.

incurred by the company in defending suits brought against the assured." While the policy was in force an action was brought against the brewing company to recover for an injury caused by one of its automobiles, and a judgment obtained against it for $9,200. This action was based on the allegations that, before the trial of the action against the brewing company, a settlement could have been effected for $6,000, and that the officers of the brewing company requested the insurance company to make a settlement for that amount, and offered to contribute $1,000 for the purpose, which, with $5,000 to be paid by the insurance company would have made up the sum demanded; that the insurance company refused to make the settlement and went on trial, which resulted in a judgment in a larger amount against brewing company, which it paid; that the refusal of the insurance company to settle caused a loss to the brewing company of the difference between the judgment it paid and the insurance money it received, less $1,000, which it was willing and offered to contribute to the settlement proposed.

The court said: "The rights of the parties are to be determined by the agreement into which they entered. By the provisions of the policy the insurance company was obliged to defend at its own cost any action against the insured, and the entire management of the defense was expressly intrusted to it, and the insured was forbidden to settle any claim, or to interfere in any negotiations or settlement, or in any legal proceeding against it. The insurer was under no obligation to pay in advance of trial, and the decision whether to settle or to try was committed to it. The words of the policy have no other meaning. Judgment in favor of the defendant on the demurrer was affirmed." [21]

§ 877. Right of assured to protect himself against excess liability.

It has also been held in a New York case where the policy

21. Schmidt & Sons. v. Travelers' Ins. Co., 244 Pa. 286, 90 Atl. 653, 52 L. R. A. (N. S.) 126.

provided that "the assured shall not voluntarily assume any liability, nor shall the assured, without the written consent of the company previously given, incur any expenses or settle any claim except at his own cost, or interfere in any negotiations for settlement, or in any legal proceeding", the company was not liable for the excess of the judgment over and above the amount of the policy, even though the company had an opportunity to settle the case for considerably less than the judgment. Under such circumstances, where the liability may exceed the face of the policy, the insured, however, has a right to protect himself with respect to any excess liability without consulting the insurer, if there is no provision in the policy excluding such a settlement. It is immaterial whether the insurer refuses or consents to the assured assuming excess liability, as such a settlement does not affect its liability under the policy. The purpose of the company, its good faith or bad faith, in refusing its consent to settlement of assured's liability in excess of the policy is not in question. It is solely a question by and between the assured and the injured.[22]

On a subsequent appeal of the same case, the court held that as the provisions of the indemnity policy did not preclude the assured from settling with respect to his liability in excess of the indemnity for which the insurer was liable, it was immaterial whether the latter granted or withheld its consent to a settlement, or acted in good or bad faith.[23]

§ 878. Settlement by assured without consent of insurer.

Where the policy provided that "the assured may settle any claim at the assured's own expense, giving immediate notice thereof in writing to the company, and the assured may settle any case at the company's expense, if the company shall have previously given its consent in writing", it was held in a New York case that a settlement so made

22. McAleenan v. Mass. Bonding & Ins. Co., 173 App. Div. 100, 159 N. Y. S. 401 (1916), aff'd, 219 N. Y. 564, 114 N. E. 114 (1916).

23. McAllenan v. Mass. Bonding & Ins. Co., 179 App. Div. 34, 166 N. Y. S. 184 (1917).

by the assured without the consent of the company released the company from liability under the policy.[24]

A policy insuring against loss on account of bodily injuries inflicted by the automobile provided that "the assured may settle any case at the company's expense if the company shall have previously given its consent in writing." A judgment was procured against the assured, from which the indemnity company had taken an appeal. Settlement was made by the assured without the insurer's consent. The court held that the insurer was not liable for the amount of the settlement, because it was made in violation of the terms of the policy.[25]

§ 879. When insurer refuses to defend.

PROVISION HAS NO APPLICATION WHERE INSURER REFUSES TO DEFEND SUIT.

The provision of the automobile liability insurance policy that the company is not responsible for any settlements made or expenses incurred by assured, unless authorized by the company, has no application where the insurer, in direct violation of the terms and conditions of the policy, refuses to defend the action against the assured. Such conduct of the company is in direct violation of the contract and a breach of its provisions. The assured, then, has a legal right to make settlement of the action, and the clause of the policy exempting the insurer from liability in case the assured settles the case does not apply.[26]

§ 880. When insurer refuses to defend. (a) Evidence.

But where the assured has settled an action against him which the insurer has refused to defend, in an action by the

24. Kennelly v. London Guarantee & Accident Co., Ltd., 184 App. Div. 1, 171 N. Y. S. 423 (1918).

25. Kennelly v. London Guarantee & Accident Co., Ltd., 184 App. Div. 1, 171 N. Y. S. 423 (1918).

26. Rosenberg v. Maryland Casualty Co., 3 N. J. Misc. 1132, 130 Atl. 726 (1925); Mayor, Lane & Co. v. Commercial Casualty Ins. Co., 169 App. Div. 772, 155 N. Y. S. 76 (1915); Fullerton v. United States Casualty Co., 184 Iowa 219, 167 N. W. 700 (1918), 6. A. L. R. 367.

assured to recover from the insurer, the burden was on the assured of proving that there was a liability under the provisions of the indemnity policy, and the amount thereof.[27]

§ 881. When insurer refuses to defend. (b) Waiver.

Where a policy of automobile liability insurance contains a clause that actual trial of the issues involved in the litigation is a condition precedent to the insured's right of recovery, such a clause is waived and the condition of the policy is breached when the insurer denies liability on the policy and refuses to either settle or defend the action. The insured, then believing that judgment may be rendered in excess of the amount of the policy, has a right to make a compromise settlement of the action; and the insured has a right to recover from the insurer such damages as were ordinarily and reasonably incurred,[28] but not exceeding the amount paid to the injured party.

Where the insurer denies liability, the clause of the policy is waived that the assured shall make no settlement of the claim without the written consent of the company, and the insured thereby has a right to effect settlement with the claimant. In an Illinois case where this question was presented, it was undoubtedly considered so well settled that it was not even discussed in the opinion of the court where judgment was rendered in favor of the insured.[29]

After the insurer has refused to defend an action brought against the assured, it is estopped to deny liability for an attorney fee incurred by the assured in defense of the action under the provision of the policy that the assured has failed to obtain its written consent.[30]

27. Mayor, Lane & Co. v. Commercial Casualty Insurance Co., 169 App. Div. 772, 155 N. Y. S. 76 (1915).

28. Independent Milk & Cream Co. v. Aetna Life Ins. Co., 68 Mont. 152, 216 Pac. 1109 (1923).

29. Boston Store v. Hartford Acci. & Ind. Co., 227 Ill. App. 192.

30. Royal Indemnity Co. v. Schwartz (Tex. Civ. App.), 172 S. W. 581 (1914).

§ 882. When insurer refuses to defend. (c) Clause for payment after trial and judgment construed.

If the insurer repudiates its obligation to assume and carry on the defense to final judgment, and abandons the case, the assured is at liberty to either contest the claim or make settlement, and it has been held that the indemnity company can not rely upon the clause of the policy to the effect that the right of the assured to maintain an action against it is limited to cases of "loss actually sustained and paid in money in satisfaction of a judgment after trial of the issue."[31]

§ 883. When insurer refuses to defend. (c) Clause for payment after trial and judgment construed. (c1) Settlement on recommendation of insurer's attorney.

Where settlement was made upon recommendation of the insurer's attorney, after insurer had assumed the defense of the action, it could not successfully deny liability because the policy provided that the company should be liable only when legally called upon to pay a judgment.[32]

§ 884. Settlement after judgment.

CLAUSE DOES NOT APPLY WHERE CLAIMANT HAS RECOVERED JUDGMENT AGAINST ASSURED IN AN ACTION DEFENDED BY INSURER.

But the clause in the automobile liability policy forbidding the settlement of any claim without the written consent of the company does not apply where the claimant has obtained judgment against the insured in an action defended by the indemnity company.[33] On such a judgment, the insured has a right to make settlement with the judgment

31. Fullerton v. United States Casualty Co., 184 Iowa 219, 167 N. W. 700 (1918), 6 A. L. R. 367.

32. Hartigan v. Casualty Co. of America, 227 N. Y. 175, 124 N. E. 789 (1916).

33. Fidelity Casualty Co. v. Marchant, Rap. Jud. Quebec, 35 B. R. 5, 4 D. L. R. 913 (1923).

creditor, without the consent of the company, and regardless of what his motives may be in making such a settlement, he is entitled to maintain an action against the company for the amount of the judgment so paid.[34]

So, where judgment was entered against the insured for an amount in excess of the face amount of the policy, an appeal was taken to the supreme court without giving bond to stay proceedings, execution was issued and insured's property was seized under the writ. The insured then made settlement with the claimant contingent upon the insurer's paying the amount of the policy. The company refused settlement, and the litigation continued. It was held by the Minnesota court, under this state of facts, that insured's conduct in effecting this contingent settlement was not a breach of the policy condition against making settlement by the insured without the written consent of the company, as its rights were not affected thereby, and that the company was liable on its policy.[35]

§ 885. Duress.

An injured person had obtained judgment against the assured for $6,500. The amount of the liability policy was $5,000. Thereupon the assured offered settlement with the judgment creditor for $5,000. The insurer refused to forego its right of appeal unless the assured paid $500 and costs of suit, and executed a full release. The court held that the release was not invalid on account of duress, because it was optional with the assured to accept the settlement on the basis outlined by the insurer, and optional with the insurer to proceed with the appeal, if it was not satisfactory.[36]

§ 886. No provision that insurer shall defend.

WHERE CONTRACT DOES NOT PROVIDE THAT INSURER SHALL

34. St. Louis Screw Co. v. Mastin (Mo. App.), 253 S. W. 96.

35. Powers v. Wilson, 139 Minn. 309, 166 N. W. 401 (1918).

36. Neuberger v. Preferred Accident Insurance Co. of New York, 18 Ala. App. 72, 89 So. 90 (1921).

DEFEND SUIT AGAINST ASSURED THE LATTER MAY SETTLE BEFORE JUDGMENT AND CAN RECOVER FROM INSURER BY SHOWING THAT HE WAS LEGALLY LIABLE AND THE AMOUNT OF SETTLEMENT WAS REASONABLE.

It has been held in a Missouri case that the insured under a contract of indemnity is not bound to wait until judgment is rendered against him, but can recover by showing that he was legally liable and that the amount of the settlement made by him was reasonable. The contract, however, did not provide that the insurer was required to defend the action against insured, and the court held that the compromise judgment which was entered with the consent of the insured was not presumptive evidence against insurer either as to the fact of insured's liability or as to the reasonableness of the settlement.[37]

§ 887. Releases insurer from liability.

If the insured makes a settlement with a wrongdoer for the damages he has sustained by the wrongful acts of the third party, and releases any and all right of action against the wrongdoer for the damages so received, the insured thereby destroys his own right of action on the policy and the insurer is released. In an action on the policy, the insurer need not plead payment or tender of payment as a condition precedent to its right to have the benefit of the settlement so made.[38]

In a New York case, where the indemnity policy provided that the insurer should have a right to defend any action against assured arising under the policy, and there was no clause binding the insurer to accept of any settlement made by the assured, the assured on his own responsibility and without the consent of the insurer, settled the claim. The assured's contention was that he believed that if the case went to trial a judgment would be recovered against him in

37. Brinkman v. Western Auto. Ind. Ass'n, 205 Mo. App. 71, 218 S. W. 944 (1920).

38. Auto. Owners' Protective Exchange v. Edwards, 82 Ind. App. 558, 136 N. E. 577 (1922).

excess of the amount of the policy, and that he was coerced into making the settlement because of the insurer's refusal. The court held that the indemnity company was not liable.[39]

§ 888. Clause prohibiting assured from interfering with settlement of suits construed.

The provision of the automobile liability policy which obligates the insurer to defend any action against the assured and withholds from the assured any right of settlement, has reference only to actions which are brought against the assured. It does not embrace actions which might be instituted by the assured against others for personal or property damage. Such an action can be instituted by the assured, and he has the right to make settlement thereof, and to stipulate that the settlement would in no wise defeat any suit that might be brought by the defendant against the assured on account of injuries sustained in the same collision. It is immaterial whether such a settlement is made with or without the knowledge and consent of the indemnity company, provided there exists no common design to prejudice the rights of the insurer in making such a settlement. There is no violation of the provision that the assured shall not interfere with an action against assured to be defended by the insurer, where the assured had sued the owner of a machine with which his car had collided, and refused to make use of the settlement agreement in the action against him because the agreement provided that it should in no way be used to defeat any suit that might be brought by the defendant in that action against the insured. Such settlement agreement providing for postponement of suit which was brought against assured to subsequent term of court was not interfering with the action within the meaning of the policy provision.[40]

39. Levin v. New England Casualty Co., 97 Misc. 7, 160 N. Y. S. 1041 (1916), 101 Misc. 402, 166 N. Y. S. 1055 (1917), aff'd, 187 App. Div. 935, 174 N. Y. 910 (1919).

40. Utterback-Gleason Co. v. Standard Accident Insurance Co., 193 App. Div. 646, 184 N. Y. S. 862, aff'd, 179 N. Y. S. 836 (1920).

§ 889. "To interfere in negotiations for compromise" construed.

"To interfere in negotiations for compromise" under the terms of an automobile liability insurance policy so as to defeat the liability of the insurer means something more than that the assured should telephone the claimant and express to him the assured's sympathy, to advise claimant to get a lawyer and fight the case, to suggest to claimant that he would have his attorneys make settlement with the insurance company, or to advise claimant that he was insured. Insured is under no obligation not to advise claimant that he carries indemnity insurance to cover his liability, and it is not a breach of the contract so worded for him to advise claimant that the attorney who sought an interview with the claimant is the attorney for the insurance company rather than his personal attorney.[41]

§ 890. Insurer not liable where assured voluntarily pays judgment against daughter.

Automobile accident indemnity policy provided that assured should not settle any claim except at his own cost, without the insurer's written consent, and that the owner should be liable only for the expenses actually sustained and paid by the insurer. In an action for death caused by the automobile while driven by assured's daughter, judgment obtained by plaintiff against the assured and his daughter was reversed in the appellate court as to the assured and affirmed against the daughter. Assured, then, without the insurer's consent, settled the judgment against the daughter, and took an assignment. In a suit on the assignment of the daughter's right of action, the court held that the insurance company was not liable, for assured was under no liability to indemnify his daughter, and no action

41. Hopkins v. American Fidelity Co., 91 Wash. 680, 158 Pac. 535 (1916).

had been brought or judgment recovered against assured by his daughter.[42]

§ 891. Execution creditor.

Settlement should be made by the automobile indemnity company with execution creditor where it has notice of execution lien, and under such circumstances is liable to the execution creditor, even though settlement was made with the insured at an agreed amount of damage.[43]

§ 892. Evidence. In action where judgment exceeded amount of insurance.

In an action by the assured against the insurer for refusing settlement, where the judgment exceeded the amount of the policy, testimony concerning injuries was inadmissible.[44]

H. INSURER'S LIABILITY—IN GENERAL.

§ 893. Contract of insurance.

A public liability insurance policy against loss arising from claims for injuries to person or property is not governed by the law of suretyship, but is to be construed and applied as a contract of insurance.[45]

§ 894. Accident—Definition.

The word "accident" is susceptible of and has received many definitions, varying with the connection in which it is used, suggests the Nebraska supreme court. It is "an event that takes place without one's foresight or expectation; an undesigned, sudden, and unexpected event; chance;

42. Thacher v. Aetna Accident & Liability Co. (U. S. C. C. A., 8th Circ.), 287 Fed. 484 (1923).

43. Combs v. Hunt, 140 Va. 627, 125 S. E. 661 (1925).

44. G. A. Stowers Furniture Co. v. American Indemnity Co. (Tex. Civ. App.), 295 S. W. 257.

45. Board of Trade Livery Co. v. Georgia Casualty Co., 160 Minn. 490, 200 N. W. 633, 40 A. L. R. 678 (1924).

contingency; often an undesigned and unforeseen occurrence of an afflictive or unfortunate character; casualty; mishap; as, to die by an accident."[46]

§ 895. Negligence.

Liability on automobile insurance policy held to arise only in case insured's negligence produced accident.[47]

§ 896. Use at time of accident.

An automobile liability policy was issued to indemnify a newspaper publisher against loss occasioned while the cars were being used to carry materials and merchandise in connection with the assured's business. At a salesmanship gathering supervised by the publisher, the automobile was used for transporting refreshments and prizes. On its return, while carrying some of the newspaper boys, some newspapers and empty containers, the car was struck by a train and six of the boys were killed. The court held that even though the main purpose for which the automobile was being used at the time of the accident was the transportation of the newspaper boys to their homes, the accident was covered by the policy and the insurer was liable.[48]

§ 897. Claims on account of bodily injuries.

On a policy providing against "loss arising or resulting from claims upon the assured for damages on account of bodily injuries actually suffered or alleged to have been suffered", insurer was held liable to assured for amount of judgments obtained against it by navigation company whose passengers had recovered for breach of contract for their safe carriage on excursion boat and in taking automobile ride.[49]

46. Webster's New International Dict.

47. Royal Ind. Co. v. May & Ball, 222 Ky. 157, 300 S. W. 347.

48. Journal Co. v. General Accident, Fire & Life Assurance Corp., Ltd., 188 Wis. 140, 205 N. W. 800 (1925).

49. Board of Trade Livery Co. v. Georgia Casualty Co., 160 Minn. 490, 200 N. W. 633, 40 A. L. R. 678 (1924).

§ 898. What constitutes "one accident."

Under a policy providing that the "insurer shall not be liable for more than $1,000 arising from one accident", the insured car negligently ran into another car which caused the steering gear of the insured car to break. It then ran into still another car. The damage to the first car amounted to $500, for which judgment was obtained against assured. The damage to the second car amounted to $1,500, of which amount the insurer paid $1,000 in compliance with the provision of its policy. The court held that there was but one accident which caused two collisions, and that the insurer by paying $1,000, had fully discharged its liability.[50]

§ 899. Valued policy.

Where the loss was partial the assured was intitled to be indemnified in full regardless of the insurable value for a total loss.[51]

§ 900. Appreciation in value.

An English car was insured in November, 1915, on a stated value of 250 pounds, and the policy was renewed in 1916, 1917 and 1918. The car was destroyed by fire in 1919, and the arbitrator found it was worth 400 pounds. The policy provided "against damage * * * not exceeding the full value of the car." The court ruled that if the increase in value had wholly accrued since the date of the last renewal, the insured was entitled to recover 400 pounds, but if it had partly accrued before that date, he could only recover 250 pounds.[52]

50. Hyer v. Inter-Insurance Exchange of Automobile Club of Southern California, 77 Cal. App. 343, 246 Pac. 1055 (1926).

51. Belleview Trading Co. v. International Indemnity Co., 167 Minn. 516, 208 N. W. 994 (1926).

52. Wilson v. Scottish Insurance Corp., Ltd., 2 Ch. 28; 89 L. J. (Ch.) 329; W. C. & Ins. R. 107; 123 L. T. 404; W. N. 169; 36 T. L. R. 545; 64 S. J. 514 (1920).

§ 901. Interest.

The auotombile insurance policy usually provides that the insurance company has sixty days after proof of loss within which to pay the claim. Interest begins to run at the end of the sixty days period. Thus, in a Mississippi case, the court was in error in holding that interest began to run from the date of the collision.[53]

§ 902. Policy issued to partnership.

Under an indemnity policy issued to a partnership, the insurer is liable for the torts of the partnership, but the policy does not indemnity the torts of an individual partner or his employee in his private affairs.[54]

§ 903. Accident "caused by automobile" construed.

Under a policy indemnifying the assured against liability on account of accident "caused by automobile," the insurer was not liable where a garage attendant was burned by reason of the assured lighting a match to ascertain the amount of gasoline in his car and igniting the gasoline. The court held that the proximate cause of the accident was the owner's negligence, separate and apart from the automobile which was the subject of insurance.[55]

§ 904. Measure of recovery.

Where a clause of a liability policy provided that "the company's liability is limited to the actual intrinsic value of the property damaged or destroyed at the time of its damage or destruction, which shall not be greater than the actual cost of the repair or replacement thereof," the policy does not limit the liability of the insurer to the actual cost of repairs, when such repairs do not make the insured car

53. Fireman's Fund Insurance Co. v. Haley, 129 Miss. 525, 92 So. 635 (1922).

54. Jacobs v. Maryland Casualty Co., 198 App. Div. 470, 191 N. Y. S. 692, aff'd 234 N. Y. 622 (1922).

55. Hill v. New Amsterdam Casualty Co., 211 App. Div. 747, 208 N. Y. S. 235 (1925).

as good as before the accident, but the insurer is additionally liable for depreciation in the value of the car.[56]

§ 905. Duress.

Insured carried $5,000 automobile liability insurance. A party injured by insured's automobile recovered judgment against insured for $6,500 and offered to compromise the judgment for $5,000. The insurer refused to accept the offered compromise and threatened to appeal the judgment unless insured paid $500 and costs of court, and executed a release of liability on the claim. The court held that such release was not void for duress.[57]

An injured claimant instituted a damage suit against assured for $25,000, for which he was protected by $5,000 liability insurance. The policy contained no provision for settlement, but the insurer having made negotiations for settlement, claimant agreed to accept $3,150, which sum the insurer refused to pay and threatened to go to trial and subject assured to personal liability over and above the amount of the policy, unless he contributed $750 of the amount. Assured paid the amount, then filed suit against insurer to recover on the ground of duress. The court held the complaint was insufficient as it did not contain an averment that the insurer agreed to consent to a settlement of any claim within the $5,000 limit, provided the sum the claimant was willing to accept was reasonable and fair and less than the amount which would probably be recovered in an action by him.[58]

§ 906. "Use in public service"—Construed.

Policy indemnifying for "use in public service" does

56. Christison v. St. Paul Fire & Marine Ins. Co., 138 Minn. 51, 163 N. W. 980 (1917).

57. Neuberger v. Preferred Accident Insurance Co. of New York, 18 Ala. App. 72, 89 So. 90 (1921).

58. Levin v. New England Casualty Co., 97 Misc. 7, 160 N. Y. S. 1041 (1916), 101 Misc. 402, 166 N. Y. S. 1055 (1917), aff' 187 App. Div. 935, 174 N. Y. S. 910 (1919).

not cover liability while car is being used for private purpose.[59]

§ 907. "Use and operation of vehicles in insured's business"—Applied.

Under a liability policy covering injuries by a truck the policy expressly limited the insurer's liability to accidents "which should happen in connection with the use and operation of the vehicles in the insured's business, including therein the loading and unloading. Girder was temporarily deposited by the truck on sidewalk. Boy was injured by girder rolling over while truck remained ready to drag the girder to its place of destination, within building. The court held that as the truck was not entirely disconnected from the delivery of the girder at the time of the accident, the insurer was liable.[60]

§ 908. Injuries sustained by president—Construed.

An automobile liability policy which indemnified the assured for injuries to employees of assured and required insurer to defend actions instituted on account of such injuries contained the additional provision that the agreement should apply to "injuries so sustained by president." The court held that the insurer was required to defend an action brought by the president against the assured for injuries he sustained while riding in assured's automobile.[61]

§ 909. Change of motor.

Changing the motor in a jitney bus in violation of the policy provision, it was held, did not relieve the insurer of liability to one injured while a passenger.[62]

59. Basta v. United States Fidelity & Guaranty Co., 107 Conn. 446, 140 Atl. 816 (1928).

60. Wheeler v. London Guarantee & Accident Co., Ltd. of London, Eng., 292 Pa. 156, 140 Atl. 855 (1928).

61. Utica Mutual Ins. Co. v. Glennie (N. Y.), 132 Misc. 899.

62. Boyle v. Manufactures' Liability Ins. Co., 96 N. J. L. 380, 115 Atl. 383 (1922).

§ 910. "One driver" clause.

THE OWNER OF AN AUTOMOBILE DOES NOT OPERATE IT WITHIN THE MEANING OF AN INDEMNITY POLICY APPYING ONLY WHEN THE MACHINE IS BEING OPERATED BY THE OWNER, WHEN HE IS MERELY PRESENT IN THE CAR DIRECTING ITS OPERATION BY ANOTHER.

The policy provided, in a New York case, that it would apply only while the automobiles were being operated by Charles Dunn (who is the owner and the named assured), for private purposes only. The question was, what was the proper meaning to be given to the words "operated by owner for private purposes only." The insurer contended that this clause was what is known as a "one driver" clause, and that the policy was issued at a reduced rate by reason of the fact that the car was to be operated only by the owner. The injured claimant contended that Dunn, the owner of the car, was operating it when he was exercising control over the driver. The court suggested that the word "operate", standing alone, doubtless has more than one meaning, but in connection with the use of motor vehicles it has acquired a definite meaning, namely, by statute, "the term 'operator' shall mean any person, other than a chauffeur, who operates a motor vehicle."[63] Said the court: "The word 'operate' is used throughout the statute as signifying a personal act in working the mechanism of the car. The driver operates the car for the owner, but the owner does not operate the car unless he drives it himself." The court considered that the word was used in the policy in the same sense in which it is used in the highway law, and held that as the owner was not operating the car at the time of the accident, the policy did not cover the loss sustained.[64]

63. New York Highway Law (Consol. Laws, chap. 25).

64. Witherstine v. Employers' Liability Assur. Corp., Ltd. of London, 235 N. Y. 168, 139 N. E. 229, 28 A. L. R. 1298 (1923), rev. 200 App. Div. 854, 191 N. Y. S. 950.

§ 911. "Use by himself"—Construed.

Where the automobile policy insures the owner against loss by reason of liability to others for injuries on account of any accident due to the owner's maintenance, or "use by himself" of the described automobile, the liability of the insurer is limited to accidents occurring while the car is being operated personally by the owner, and the insurer is not liable for such accidents as occur while a person other than the owner is driving the car, even though the owner is at the time an occupant of the automobile.[65]

§ 912. When insurer not liable for acts of assured's chauffeur.

In a New York case, it appeared that the assured had placed his truck in storage, and gave the storage company permission to rent it. At the time of the accident, the car was being operated by a chauffeur under the direction of the storage company, who hired and paid him. The insurer refused to defend, and assured settled the action. The court held that as the chauffeur was not the servant of the assured and acting for him, the insurer was not liable.[66]

§ 913. "Loss and expense by reason of claims made upon assured"—Construed.

A policy insured "Hartigan & Dwyer * * * Troy * * * department store merchant," a partnership, against "loss and expense by reason of claims made upon the assured" by reason of accidents due to "ownership, maintenance, or use" of the automobile. At the time of the accident, the car was being used by another firm which was composed of the partners and another, and located in a different city. The court held that the insurer's liability was limited to use of the car by the assured only, and that there was no right of recovery.[67]

65. Lucas v. Mueller et al., 183 Wis. 529, 198 N. W. 286 (1924).

66. Mayor, Lane & Co. v. Commercial Casualty Ins. Co., 169 App. Div. 772, 155 N. Y. S. 75 (1915).

67. Hartigan et al. v. Casualty Co. of America, 227 N. Y. 175, 124 N. E. 789 (1919).

§ 914. Liability policy for public benefit—Jitney policy.

The rule was laid down in a New Jersey case that an indemnity policy on a jitney bus is for the benefit of the traveling public, and legal rights or equities existing between insured and insurer by reason of any violation of the terms of the policy cannot effect the right of the public who claims under its provisions, after such claim has been substantiated by a judgment at law.[68]

§ 915. Where insurer obligates itself to greater extent than required by statute. No defense.

DEFENSE. IT IS NO DEFENSE TO A POLICY THAT THE INSURER HAS OBLIGATED ITSELF TO A GREATER EXTENT THAN WAS REQUIRED BY STATUTE.

The question arose in a New Jersey case whether the insurer had a valid defense to an accident indemnity policy where the insurer obligated itself to a greater extent than was required by statute.[69] The policy insured automobile in vicinity of a certain city, but the statute only required policy covering injuries within the city. Jitney was enroute to Atlantic City, eighteen miles therefrom and in the same county, when accident occurred. The court held that the autobus was being operated within the "vicinity" of that city at the time of the accident and within the meaning of the policy, and the insurer was liable even though it had exceeded the liability imposed by statute.[70]

§ 916. Liability of insurer for negligence of dependent members of insured's family.

WHERE THE POLICY COVERS INJURIES "ACCIDENTALLY SUFFERED OR ALLEGED TO HAVE BEEN SUFFERED BY ANY PERSON OR PERSONS BY REASON OF THE OWNERSHIP, MAINTENANCE OR USE" OF THE DESCRIBED AUTOMOBILE.

Where the policy provides that the assured is indemnified

68. Boyle v. Manufacturers' Liability Ins. Co., 96 N. J. L. 380, 115 Atl. 383 (1922).

69. P. L. 1916, N. J., p. 283.

70. McClellan v. General Casualty & Surety Co. (N. J.), 134 Atl. 911.

against claims for damages on account of bodily injury "accidentally suffered or alleged to have been suffered by any person or persons by reason of the ownership, maintenance or use" of the automobile therein described, it does not mean that the assured is protected only against such claims as may arise while he is personally in charge of or operating the car. The assured may, within the conditions of such a policy, give his car over to dependent members of his family and such individuals with whom the car has been intrusted will be considered as agents or representatives of the assured while operating the car. Their negligence, if any, in the operation of the car will be imputed to the assured. In such a case, the Iowa court has held that even though the automobile was being operated by the assured's son, who was over the age of twenty-one years, but who was just out of school, living at home and dependent on the assured, the insurer was liable for accidents resulting from his negligent operation of the car.[71] The court said: "The contract as written indemnifies the plaintiff against claims for damages on account of bodily injury 'accidentally suffered or alleged to have been suffered * * * by any person or persons by reason of the ownership, maintenance, or use' of the described automobile. This clearly does not limit the indemnity to claims for damages on account of injuries occurring while the insured is personally using the car, but extends to all claims of the nature made by reason of his ownership or maintenance thereof. While we have held that the owner of an automobile is not liable for injury caused to another by the neglect of a person, even a member of his own family, who attempts to operate the car without the authority, express or implied, of such owner, yet we have never held that one who purchases and owns an automobile for family use, and permits it to be used by the dependent members of his family for their own pleasure, may not be held liable for their neglect in such use of it.

71. Fullerton v. U. S. Casualty Co., 184 Iowa 219, 167 N. W. 700, 6 A. L. R. 367 (1918).

On the contrary, we think it may well be said that when a car owner gives it over to the use of his family, and permits it to be operated by the dependent members thereof, the individuals to whom it is so intrusted may properly be considered his representatives or agents in such a sense that their negligence in the use of the car is imputable to him, and that persons injured by reason of such negligence, without fault on their own part, may hold such owner liable for damages so sustained; and if such be the law, then the policy in suit indemnifies the plaintiff against it. Indeed, the clause in the policy already mentioned, exempting the company from liability when the accident occurs while the car is being driven by anyone under sixteen years of age, seems to be an implied concession or recognition of such liability, where the driver is any member of the family over that age." [72]

§ 917. Change of interest.

The liability policy is in effect just so long as the assured remains the owner of the car, and it does not run for the benefit of his assignee, without the insurer's consent.[73]

§ 918. Change of interest—City ordinance.

Even though an automobile indemnity bond is issued in pursuance of city ordinance to protect the assured against liability for injuries to any person by reason of the negligence of the assured in the operation of certain automobiles as passenger automobiles where one of the insured automobiles is sold and while being operated by the vendee it collides with another car and causes injury to one of the occupants, the insurer is not liable, for the policy covers only the assured named in the policy.[74]

72. Fullerton v. U. S. Casualty Co., 184 Iowa 219, 167 N. W. 700, 6 A. L. R. 367 (1918).

73. Bess v. Commonwealth Casualty Co., 101 N. J. L. 380, 128 Atl. 250 (1925); Whitney v. Employers' Indemnity Corporation, 200 Iowa 25, 202 N. W. 236 (1925); Keneagh et al. v. Baker (Tex. Civ. App.), 284 S. W. 321 (1926).

74. Keneagh v. Baker (Tex. Civ. App.), 284 S. W. 321 (1926).

§ 919. Test of business uses.

Where liability policy indemnified the assured against damages while the automobile was being used for "private and pleasure purposes and all ordinary business uses except transportation or delivery of goods only," liability was not avoided by reason of the fact that assured towed a buggy for a friend without remuneration.[75]

§ 920. Assured's loss as member of partnership.

Where a policy indemnifies the assured against liability for loss imposed on him by law by reason of the ownership, maintenance, or use of his automobile, a loss sustained by the assured as a partner in a firm against which judgment is recovered for damages caused by the automobile while being driven in the firm business is covered, if the assured is legally liable for any portion of such loss.[76]

§ 921. Violation of speed law.

Where an insurance policy provides for the payment to the insured of a certain amount of money for which the assured shall become liable to pay as damages for property injured or destroyed through collision of his automobile with another automobile, the insurance company is liable under this policy for the value of the automobile destroyed in a collision between the automobile of the insured and that of another party, though the insured be running his automobile, at the time of the collision, at a speed in excess of that allowed under the state laws, where there is nothing in the policy exempting the insurance company from liability because of the violation of these laws.[77]

75. Juskiewicz v. New Jersey Fidelity & Plate Glass Ins. Co., 210 App. Div. 675, 206 N. Y. S. 566 (1924).

76. Steinfield v. Mass. Bonding & Ins. Co., 79 N. H. 422, 111 Atl. 303 (1920).

77. Fireman's Fund Insurance Co. v. Haley, 129 Miss. 525, 92 So. 635, 23 A. L. R. 1470 (1922); See Messersmith v. American Fidelity Co., 187 App. Div. 35, 175 N. Y. S. 169 (1919), rev. 101 Misc. 598, 167 N. Y. S. 579, aff'd 232 N. Y. 161, 133 N. E. 432; Tinline v. White Cross Ins. Ass'n, 3 K. B. (Eng.) 327 (1921).

§ 922. Assured signing minor's application for license.

INSURER LIABLE WHERE MINOR DRIVER'S APPLICATION FOR LICENSE WAS SIGNED BY ASSURED, NOTWITHSTANDING DRIVER'S ERRAND WAS PERSONAL.

The policy provided, in a California case, "against actual loss by reason of liability imposed by law * * * on account of bodily injuries (including death resulting therefrom) accidentally suffered * * * by reason of the operation or use" of an automobile. Injury was sustained while car was driven on personal errand by insured's minor nephew, whose application for chauffeur's license had been signed by assured. Insurer was held liable under the provision of statute which made assured jointly and severally liable with his nephew by reason of assured having signed minor's application for license.[78]

§ 923. "Other's liability assumed under contract" construed.

Liability of assured imposed by law on signing minor son's application for operator's license is not "other's liability assumed under contract" exempting insurer under liability policy.[79]

§ 924. Assured's right of recovery for wife's injuries.

In a North Carolina case, assured's wife was injured as a result of his negligent driving of an automobile. She recovered a judgment against him. In an action brought by the assured on the policy, the court denied insurer's contention that it would be "against public policy and sound morals" to permit assured to recover, for under the laws of that state a wife has the right by statute to sue her husband in tort and recover judgment for personal injuries which have been caused by his negligent conduct.[80]

78. Lackey v. Olds & Stoller Inter-exchange, 80 Cal. App. 687, 252 Pac. 672 (1927); Cal. Motor Vehicle Act (St. 1917, p. 407) par. 24, (a) amended by St. 1919, p. 223, par. 14.).

79. Markle v. American Automobile Ins. Co., 82 Cal. App. 137, 255 Pac. 260 (1927).

80. Roberts v. United States Fidelity & Guaranty Co., 188 N. C. 795, 125 S. E. 611 (1924).

§ 925. Deductible clause.

Where the policy provided that "each claim hereunder shall be adjusted separately, and from the amount of each claim when determined, the sum of $25 shall be deducted and the company shall be liable for loss or damage in excess of that amount only," which was followed by a provision for appraisement in the event of disagreement, it was contended by the insured that the provision quoted applied only where there is a disagreement and an appraisement. The court held that the words quoted clearly restrict the indemnity to the amount of the loss less $25 in all cases.[81]

OMNIBUS COVERAGE CLAUSE.

"ADDITIONAL ASSURED", UNDER AUTOMOBILE LIABILITY POLICY, IS DEFINED AS ANY PERSON LEGALLY OPERATING OR RESPONSIBLE FOR OPERATING OF INSURED AUTOMOBILE WITH PERMISSION OF NAMED ASSURED.

PERMISSION HAVING BEEN GIVEN TO USE THE CAR, ITS USE IS NOT LIMITED TO THE PURPOSE CONTEMPLATED OR SPECIFIED, WITHIN THE MEANING OF THE POLICY, BUT EXTENDS TO ANY USE MADE WHILE THE PERMISSION LASTS.

§ 926. Omnibus coverage clause. (a) In general.

The omnibus coverage clause gives additional assureds, other than the person named in the liability policy as assured, with certain specified limitations, the benefit of the policy. The clause usually reads:

"The indemnity provided by this policy is so extended as to be available, in the same manner and under the same conditions as it is available to the named assured, to any person or persons while riding in or lawfully operating any of the insured automobiles, and to any person, firm or corporation legally responsible for the operation thereof, provided such use or operation is with the permission of the named assured, or, if the named assured is an individual, with the permission of an adult member of the named as-

81. Stix v. Travelers Indemnity Co., 175 Mo. App. 171, 157 S. W. 870 (1913).

sured's household other than the chauffeur or a domestic servant."

§ 927. Omnibus coverage clause. (b) Assured—Defined.

The liability policy usually provides that the unqualified term "assured" wherever used in the policy, "shall include in each instance any other person, firm or corporation entitled to indemnity, * * * but the qualified term 'named assured' shall apply only to the assured named in the policy."

§ 928. Omnibus coverage clause. (c) Additional assured—Defined.

An employee to be an "additional assured" within the meaning of the ominbus clause of the liability policy must be one who is using his employer's automobile at the time of the accident, with permission of his employer.[82] If the employee, as, for example, a chauffeur, was using the automobile for his own purposes at the time of the accident, but without the consent or permission of the assured, the insurer is not liable.[83]

§ 929. Omnibus coverage clause. (d) Permission to use—Construed.

Under an omnibus clause in a policy insuring the owner of an automobile against liability for injuries through the operation of the car, which makes the insurance available to any person while riding in or legally operating the car, "provided such use or operation is with the permission" of the assured, the permission is not limited to use of the car for a specified purpose, but extends to any use made while the permission lasts. For example, if the car is lent to one to go to his home to change his clothes, the insurance

82. Stovall v. New York Indemnity Co., 157 Tenn. 301, 8 S. W. (2nd) 473 (1928).

83. Schoenfeld v. New Jersey Fidelity & Plate Glass Ins. Co., 203 App. Div. 796, 197 N. Y. S. 607 (1922).

will inure to the benefit of a guest of the borrower while the borrower is operating the car entirely off the route along which the errand for which he borrowed the car would have taken him.[84] Where a sales manager who had possession of his employer's car was permitted to use it in furtherance of employer's business, drove the car on a pleasure trip outside of his territory, he was an "additional assured", and persons injured on the trip were entitled to recover on the indemnity policy.[85]

The omnibus clause is inapplicable where the operator of the car at the time of the injury had purchased it from the assured on contract, for the assured was not in a position to give his consent for the use of the car.[86]

Where the policy indemnified the insured "against all sums for which friend or relative of the insured while driving the car with the insured's general knowledge and consent shall become legally liable," the insured was permitted to recover as trustee for his sister, who was a licensed driver, for liability she had incurred while negligently driving the car with insured's consent.[87]

§ 930. Omnibus coverage clause. (e) Not words of limitation.

Where the automobile liability policy indemnified against loss from claims on account of accidental injuries to, or death of "any person or persons" resulting from the operation of the automobile and contained the additional clause that the assured shall include the assured named in the declaration and any person or persons "while riding in or operating" the automobile with the permission of assured or any adult member of his family, the additional clause is

84. Dickinson, Adm'r v. Maryland Casualty Co., 101 Conn. 369, 125 Atl. 866, 41 A. L. R. 500 (1924).

85. Stovall v. New York Indemnity Co., 157 Tenn. 301, 8 S. W. (2nd) 473 (1928).

86. Whitney v. Employers' Indemnity Corporation, 200 Iowa 25, 202 N. W. 236 (1925), 41 A. L. R. 495.

87. Williams v. Baltic Ins. Ass'n of London, 2 K. B. 282, 93 L. J. K. B. 819, 131 L. T. 671, 40 T. L. R. 668 (1924).

not to be construed as limiting the liability of the insurer. Thus, where a third person riding in the automobile with assured's permission was injured and recovered judgment against him, the insurer was liable under the policy to indemnify assured for the amount he paid to satisfy the judgment.[88]

§ 931. Omnibus coverage clause. (f) Not an accident policy.

Under liability policy providing that "any insurance granted hereunder shall, in addition to the named assured, inure to the benefit of any person, except chauffeurs and domestic servants, riding in" the described automobile, "as well as to the benefit of any person, firm, or corporation responsible for the operation of said automobile, while said automobile is being used with the express or implied consent of the assured named in the policy or of an adult member of the said assured's household who is not a chauffeur or domestic servant," it was not to be construed in any sense as an accident policy for the benefit of any person riding in the car as a guest of the assured, but provided the same protection to the guest in the way of public liability insurance that it did the assured, should the guest drive the assured's car.[89]

AGE LIMIT—STATUTORY PROVISION.

PROVISION OF AUTOMOBILE LIABILITY POLICY THAT THE INSURANCE DOES NOT COVER WHILE AUTOMOBILE IS BEING OPERATED BY ANY PERSON UNDER THE AGE LIMIT FIXED BY LAW, OR IN ANY EVENT UNDER THE AGE OF SIXTEEN YEARS, IS VALID AND ENFORCEABLE, AND A VIOLATION WILL DEFEAT ASSURED'S RIGHT OF RECOVERY.

HOWEVER, WHERE THE POLICY DOES NOT CONTAIN ANY SUCH PROVISIONS AND IS SILENT, THE INSURER IS LIABLE WHERE THE INSURED CAR IS OPERATED BY A PERSON UNDER THE AGE PROVIDED BY STATUTE, IF THERE IS NO CAUSATIVE CONNECTION

88. Union Automobile Ins. Co. v. Samelson, 71 Colo. 479, 207 Pac. 1113 (1922).

89. American Automobile Insurance Co. v. Cone (Tex. Civ. App.), 257 S. W. 961 (1923).

BETWEEN THE OPERATOR'S AGE AND THE HAPPENING OF THE ACCIDENT.

§ 932. Age limit. (a) In general.

The automobile liability policy usually provides that the insurance does not cover while the automobile is being operated by any person under the age limit fixed by law, or in any event under the age of sixteen years.

§ 933. Age limit. (b) Valid.

The provision is valid and enforceable, and a violation of its provisions either by reason of the insured automobile being operated by a person under the age fixed by statute or under the age named in the policy will defeat assured's right of recovery.[90]

§ 934. Age limit. (c) Illustrations.

The policy, in a New York case, provided that the insurer would not be liable "in respect of injuries caused in whole or in part by an automobile while being driven or manipulated by any person in violation of law as to age." State statute prohibited any person under the age of eighteen years from operating a motor vehicle unless accompanied by a duly licensed chauffeur or the owner of the vehicle. Where the car was driven at the time of an accident by assured's son, who was under sixteen years of age, and was

90. Brock v. Travelers Ins. Co., 88 Conn. 308, 91 Atl. 279 (1914); Mitzner v. Fidelity & Casualty Co. (Ind. App.), 154 N. E. 881 (1927); Commonwealth v. Henry, 229 Mass. 19, 118 N. E. 224, L. R. A. 1918B, 827; Mannheimer Bros. v. Kansas Casualty & Surety Co., 147 Minn. 350, 180 N. W. 229 (1920); Union Indemnity Co. v. Hossley, 142 Miss. 783, 107 So. 548 (1926); Hossley v. Union Indeminty Co. of New York, 137 Miss. 537, 102 So. 561 (1925); Messersmith v. American Fidelity Co., 187 App. Div. 35, 175 N. Y. S. 169, aff'd 232 N. Y. 161, 133 N. E. 432 (1921); O'Connell v. New Jersey Fidelity & Plate Glass Ins. Co., 201 App. Div. 117, 193 N. Y. S. 911 (1922); Wagnor v. Fidelity & Casualty Co., 215 App. Div. 170, 213 N. Y. S. 188 (1926); Morrison v. Royal Indemnity Co., 180 App. Div. 709, 167 N. Y. S. 731 (1917); Royal Indemnity Co. v. Schwartz (Tex. Civ. App.), 172 S. W. 581 (1915); MacLure v. General Accident Ins. Co. of Canada, 3 Dom. L. R. 133 (1925); Tinline v. Whitecross Ins. Ass'n, Ltd., 90 L. J. K. B. 1118; 3 K. B. 327, 125 L. T. 632, 26 Com. Cas. 347, 37 T. L. R. 733 (1921).

accompanied by an unlicensed chauffeur who sat in the back seat, the insurer was not liable, for the provision of the policy and the statute of the state was violated.[91]

Insured was not covered when an accident occurred while car was being operated by seventeen year old son of the owner, where New York statute provided that persons under eighteen years of age should not operate automobiles unless accompanied by licensed chauffeur or owner of car, and insured's policy provided that it should not cover where car was driven by person under legal age.[92] Where the policy provided that the insurer would not be liable for accidents occurring while the car was being driven by a person in violation of law as to age and an ordinance made it unlawful for persons under eighteen years of age to operate an automobile, the insurer was not liable, if the ordinance was valid; but the ordinance was invalid.[93]

The insurer was not liable upon a policy which excepted it from liability in case the truck was operated by a person under the age fixed by law for automobile drivers, or in any event under sixteen years, where injuries were received by a pedestrian while the car was being driven by a girl under sixteen.[94]

§ 935. Age limit. (d) Statute.

WHERE ASSURED'S TRUCK DRIVER WAS BETWEEN SIXTEEN AND EIGHTEEN YEARS OF AGE AT THE TIME OF COLLISION WITH ANOTHER AUTOMOBILE, IT WAS NOT DRIVEN BY PERSON CONTRARY TO STATUTORY AGE LIMIT.

The policy provided that it did "not cover in respect of any automobile while driven or manipulated by any person contrary to the statutory age limit of any state or under the age of eighteen years where there is no age limit."

91. Morrison v. Royal Indemnity Co., 180 App. Div. 709, 167 N. Y. S. 732 (1917).

92. Wagner v. Fidelity & Casualty Co., 215 App. Div. 170, 213 N. Y. S. 188 (1926).

93. Royal Indemnity Co. v. Schwartz (Tex. Civ. App.), 172 S. W. 581 (1914).

94. Mitzner v. Fidelity & Casualty Co. (Ind. App.), 154 N. E. 881 (1927).

The delivery truck was driven by a boy over sixteen but under eighteen years of age at the time of a collision with another automobile and as a result of which the injured claimant obtained judgment against the assured. The truck driver had a chauffeur's license, although the state forbade the issuance of such a license to anyone under eighteen. The minimum age limit for driving a car was sixteen, but the statute did not expressly forbid one under eighteen from driving an automobile as a hired chauffeur. Provision of an earlier statute that no person should operate a vehicle unless he should comply in all respects with requirements of statute and that such a person must be at least eighteen years of age was omitted from later enactment. The court held that as there was no statutory prohibition against a person over sixteen years of age driving a car, the provision of the policy did not apply.[95]

The violation of New York highway law by minor driving an automobile does not preclude recovery on an insurance policy indemnifying the owner against loss for injuries caused to others by the operation of the automobile.[96]

In a Connecticut case, the policy provided that it should not apply while the machine was being driven or manipulated "by any person under the age fixed by law, or under the age of sixteen in any event." A state statute provided that "no person shall operate a motor vehicle * * * until he shall have obtained from the secretary * * * a license for that purpose, but no such license shall be issued until said secretary is satisfied that the applicant is over eighteen years of age and is a proper person to receive it * * * Nothing herein contained shall prevent the operating of a motor vehicle by an unlicensed person over sixteen years of age or more * * * if accompanied by a licensed operator." The court held that the insurer was liable for

95. Mannheimer Bros. v. Kansas Casualty & Surety Co., 147 Minn. 350, 180 N. W. 229 (1920); See Witt v. Continental Casualty Co., (C. P. Alleghany County, Pa.), 70 Pittsburgh Legal Journal, 586 (1922).

96. O'Connell v. New Jersey Fidelity & Plate Glass Ins. Co. (N. Y. App. Div.), 201 App. Div. 117, 193 N. Y. S. 911 (1922).

injuries sustained by an injured third party while the car was operated by assured's sixteen year old son, unaccompanied by a licensed chauffeur. The assured's son did not come within the meaning of the words of the policy "under the age fixed by law", and the insurer was not exempted by the policy because the automobile was operated contrary to the statute.[97]

§ 936. Age limit. (e) Estoppel.

Where the assured had represented that a person accompanying his minor son in the operation of the insured car was a licensed chauffeur, when in fact, he was not, the insurer having relied upon the statement was not estopped from asserting it as a defense because it might with reasonable diligence have ascertained the truth, nor was the insurer estopped because the statute charged the chauffeur accompanying the driver with the duty of superintending the driving, even though its representatives may have known that the chauffeur occupied the back seat.[98]

§ 937. Age limit. (f) Evidence.

The indemnity policy exempted the insurer from liability on account of injuries or death suffered by any person while the automobile was being driven by or in charge of any person under the age of sixteen years. At the time of the accident, the assured was instructing his grand-daughter who was under sixteen years of age how to drive the car. She was in the driver's seat, but before the accident assured seized the steering wheel, changed the course of the car, and set the emergency brake. The court held that as the assured was in control of the car, insurer was liable.[99]

97. Brock v. Travelers' Ins. Co., 88 Conn. 308, 91 Atl. 279 (1914).

98. Morrison v. Royal Indemnity Co., 180 App. Div. 709, 167 N. Y. S. 732 (1917).

99. O'Connell v. New Jersey Fidelity & Plate Glass Ins. Co., 201 App. Div. 117, 193 N. Y. S. 911 (1922); See Williams v. Nelson, 228 Mass. 191, 117 N. E. 189, Ann. Cas. 1918D, 538.

§ 938. Age limit. (g) Burden of proof.

Where the policy exempts the insurer from liability for loss occurring while the car was being driven by one under sixteen years of age, the burden of proving that the car was being driven by one under that age when the accident occurred is on the insurer.[1]

I. PROCEDURE.

§ 939. When action accrues.

In a California case, the contract provided that no action should be brought against the insurer for money actually paid by assured in satisfaction of a judgment after trial of the issue, in a suit instituted within the period limited by the statute of limitations, unless brought within ninety days after the right of action accures. Plaintiff paid judgment before appeal was decided against him, but not within ninety days of instituting action. Court held that cause of action did not accrue until appeal was decided.[2]

§ 940. Venue.

An incorporated association whose business is that of indemnifying its members against loss from personal and property damage claims arising from the operation of their automobiles is an insurance company, and an action on the contract may be brought in the county in which the plaintiff resides, by virtue of the provision of a city ordinance and the state statute.[3]

§ 941. Res adjudicata.

Judgment is not *res adjudicata* against an indemnity com-

1. O'Connell v. New Jersey Fidelity & Plate Glass Ins. Co., 201 App. Div. 117, 193 N. Y. S. 911 (1922).

2. Sutherland v. California Highway Indemnity Exchange, —— Cal. App. ——, 264 Pac. 278 (1928).

3. Kansas Gen. St. 1915, Art. 6941; Emerson v. Western Automobile Indemnity Ass'n, 105 Kan. 242, 182 Pac. 647 (1919).

pany where it is not made a party to the original suit against the assured.[4]

§ 942. Res adjudicata.

The judgment rendered against the assured is *res adjudicata* as to the issue of contributory negligence in a subsequent action by the injured claimant to recover from the insurer.[5]

§ 943. Attorney fees.

Insurer is liable to compensate assured for attorney fees incurred in defending action to recover for depreciation in car after repairing, which obligation the insurer wrongfully denied that it was not liable for under the policy.[6]

§ 944. Vexatious refusal to pay.

Insurer was liable for vexatious refusal to pay where it abandoned its original ground for refusal to pay and defended on a different ground on which it lost.[7]

§ 945. Illustration.

Where Missouri statute provided attorney's fee in case the insurer vexatiously refused to pay the loss, although there was no direct and positive evidence to the effect that the delay in effect was vexatious, it was proper for the jury to infer and conclude that the delay was vexations from a survey of all the facts and circumstances in the cases, including the validity of the claim and the fact that suit was necessary to collect it.[8]

4. Denny v. Royal Indemnity Co. of New York, (Ohio App.), 159 N. E. 107 (1927); Whitney v. Employer's Indemnity Corporation, 200 Iowa 25, 202 N. W. 236 (1925).

5. Metropolitan Casualty Insurance Co. v. Albritton, 214 Ky. 16, 282 S. W. 187 (1926).

6. Christison v. St. Paul Fire & Marine Co., 138 Minn. 51, 163 N. W. 980 (1917).

7. Third National Bank v. Yorkshire Ins. Co., 218 Mo. App. 660, 267 S. W. 445 (1924).

8. Stix v. Travelers' Indemnity Co., 175 Mo. App. 171, 157 S. W. 870 (1913).

§ 946. Failure to appeal. Measure of damages.

Failure of an insurer to appeal from a judgment for personal injuries against assured for more than the amount of its own liability after it had promised so to do, does not as a matter of law render insurer liable to assured or preclude it from asserting otherwise. The assured can not recover from the insurer, under such circumstances, without proof of damages.[9]

§ 947. Pleading. (a) Presumption as to expiration of policy.

As a pleading is contrued against the pleader, where petition fails to allege that policy was in force at time of injury, there is presumption that it had expired or was inoperative at such time.[10]

§ 948. Pleading. (b) Sufficiency as to averment of non-payment.

Averment of non-payment could be implied where the complaint alleged that the plaintiff refused to accept defendant's tender of premium; defendant denied liability and refused to accept the burden placed upon it by the policy, whereby plaintiff was damaged by reason of the defendant's failure to comply with the terms of its policy.[11]

§ 949. Pleading. (c) Answer—Sufficiency—Appeal bond.

In an action on automobile liability policy for amount of judgment paid by assured, insurer's plea that assured interfered with appeal by paying judgment was insufficient without allegation that appeal bond was filed.[12]

§ 950. Pleading. (d) Defense—Negligence.

It is no defense to an action on an automobile liability policy, which contains no express provision to that effect,

9. Sterios v. Southern Surety Co., 122 Wash. 36, 209 Pac. 1107 (1922).

10. Transylvania Casualty Ins. Co. v. Williams, 209 Ky. 626, 273 S. W. 536 (1925).

11. Jones v. International Indemnity Co., 39 Cal. App. 706, 179 Pac. 692 (1919).

12. Ferry v. National Motor Underwriters, 224 Ill. App. 241.

that the injury to the automobile was caused by the assured's negligence.[13]

§ 951. Pleading. (e) Defense. Wrongful interference with contractual rights.

If the insurer, by wrongful conduct, unjustifiably prevents payment of the loss in money after trial of the issue, it will be precluded from asserting, in an action on the policy, that the policy did not mature by reason of non-payment.[14]

§ 952. Evidence. (a) Existence of insurance.

In an action against an assured by a claimant who has received personal injuries or property damage due to the alleged negligent operation of the assured's automobile, it is error to admit testimony showing that the defendant is insured; and it is improper for claimant's attorney to make any remarks to the jury about it.[15]

13. Wheeler v. Globe & Rutgers Fire Ins. Co., 125 S. C. 320, 118 S. E. 609 (1923).

14. Emerson v. Western Automobile Indemnity Ass'n, 105 Kan. 242, 182 Pac. 647 (1919).

15. Blaback v. Blachsher, 11 Ala. App. 545, 66 So. 863 (1914); Ruwisch v. Knoebel, 233 Ill. App. 526 (1914); Byalos v. Matheson, 243 Ill. App. 60 (1926); Livingston v. Dole, 184 Iowa 1340, 167 N. W. 639 (1918); McDermott v. Johnson, 193 Iowa 19, 186 N.W. 630 (1922); Braun v. Bell, 247 Mass. 437, 142 N. E. 93 (1924); Harris v. P. Koenig Coal Co., 223 Mich. 683, 194 N. W. 511 (1923); Pritz v. Carnot, 179 N. Y. S. 164 (1919); Horan v. Altman, 176 N. Y. S. 433 (1919); Allen & Arnink Automobile Renting Co. v. United Traction Co., 91 Misc. 531, 154 N. Y. S. 934 (1915); Tincknell v. Ketchman, 78 Misc. 419, 139 N. Y. S. 620 (1912); Griessel v. Adler, 183 App. Div. 816, 171 N. Y. S. 183 (1918); Akin v. Lee, 206 N. Y. 20, 99 N. E. 85, rev'g 145 App. Div. 950 (1912); Luttrell v. Hardin, 193 N. C. 266, 136 S. E. 726 (1927); Piechuck v. Magusiak, 82 N. H. 429, 135 Atl. 534 (1926); Jones v. Sinsheimer, 107 Or. 491, 214 Pac. 375 (1923); Ross v. Williamette Valley Transfer Co., 119 Or. 395, 248 Pac. 1088 (1926); Well v. Morrison, 121 Or. 604, 256 Pac. 641 (1927); Rosumny v. Marks, 118 Or. 248, 246 Pac. 723 (1926); Lidfors v. Pflaum, 115 Or. 142, 205 Pac. 277 (1925); Coblentz v. Jaloff, 115 Or. 656, 239 Pac. 825 (1925); Scranton Gas & Water Co. v. Weston, 63 Pa. Sup. Ct. 570 (1916); Conover v. Bloom, 269 Pa. 548, 112 Atl. 752 (1921); Burgess v. Germany-Roy-Brown Co., 120 S. C. 285, 113 S. E. 118 (1922); Duke v. Parker, 125 S. C. 442, 118 S. E. 802 (1923); Bianchi v. Millar, 94 Vt. 378, 111 Atl. 524 (1920); Carter v. Walker (Tex. Civ. App.), 165 S. W. 483 (1914); Moy Quon v. Furuya Co., 81 Wash. 526, 143 Pac. 99 (1914).

If the act of plaintiff's counsel is not willful, the court need not direct a mistrial.[16] But it has been held that evidence of insurance might be admissible to show ownership.[17]

Error of the court in admitting evidence that defendant was covered by insurance against any personal loss cannot be cured by the court's instructing the jury to disregard it.[18]

But references which may be made during the trial by counsel to the effect that defendant is covered by liability insurance do not constitute reversible error where the jury is admonished by the court to disregard the remarks or if no ruling of the court is requested.[19]

§ 953. Evidence. (b) Cross-examination.

In an action against a garage keeper, for the benefit of an insurer that had paid a loss due to the negligence of such garage keeper, where a witness had testified as to the amount of damage done, questions on cross-examination designed to show that the witness was in the employ of the insurance company should have been allowed as bearing upon the weight of the testimony of the witness.[20]

§ 954. Evidence. (c) Person driving car.

Evidence that the owner ran into the injured party while

16. Wells v. Morrison, 121 Or. 604, 256 Pac. 641 (1927); Lidfors v. Pflaum, 115 Or. 142, 205 Pac. 277, 236 Pac. 1059 (1925).

17. Magee v. Vaughan (C. C. A.), 212 Fed. 278 (1914); McGovern v. Oliver, 177 App. Div. (N. Y.) 167 (1917).

18. Martin v. Lilly, 188 Ind. 139, (1919); Aqua Contracting Co. v. United Railways Co. of St. Louis (Mo. App.), 203 S. W. 481 (1918); Tincknell v. Ketchman, 78 Misc. 419, 139 N. Y. S. 620 (1912); Carter v. Walker (Tex. Civ. App.), 165 S. W. 483 (1914); Fleming v. Hartrick, — W. Va. —, 141 S. E. 628 (1928); Schmidt v. Schalm, 2 Ohio App. 268 (1919).

19. Norris v. West, 78 Ind. App. 391, 129 N. E. 862 (1922); Stafford v. Noble, 105 Kan. 219, 182 Pac. 650 (1919); Park v. Schell, 220 Ky. 317, 295 S. W. 161 (1927); McNamara v. Leipzig, 180 App. Div. (N. Y.) 515 (1917) Gortz v. Ravenel, 127 S. C. 505, 121 S. E. 369 (1923); Engler v. Hatton (Tex. Civ. App.), 2 S. W. (2nd) 519 (1928).

20. Stevens v. Stewart Warner Speedometer Corp., 223 Mass. 44, 111 N. E. 771 (1916).

driving an automobile and that the automobile described in the policy was found without any one in it soon after the accident only a mile and a half from the place where the accident occurred, was sufficient to prove that the owner was driving the automobile described in the policy when he ran into injured party.[21]

§ 955. Evidence. (d) Fraudulent release.

Evidence of negotations by an adjustment company, looking to the settlement of a claim against an insurance company carried on in the insurance company's office, was not sufficient to establish fraud of the company in procuring the settlement and release.[22]

§ 956. Evidence. (e) Authority of adjuster.

In an action for damages arising out of an automobile accident where it appeared that the settlement with the insured party had been made by an insurance adjuster, it was permissible, in proving his authority to represent the defendant, to show that he was acting under the provisions of an indemnity contract issued by the defendant to his company.[23]

§ 957. Evidence. (f) Negligence—Chauffeur.

Where the insurer claimed that the damage was due to the negligence of the chauffeur, the chauffeur should have been permitted to testify that just before he collided he discovered something wrong with the steering gear.[24]

§ 958. Jury—Right to trial by.

Insurer instituted suit in equity under the subrogation clause of its policy, making the assured a party, and alleged

21. Capelle v. United States Fidelity & Guaranty Co., 80 N. H. 481, 120 Atl. 556 (1923).

22. Horsey v. Ciaroro, 280 Pa. 513, 124 Atl. 677 (1924).

23. Althoff v. Torrison et al., 140 Minn. 8, 167 N. W. 119 (1918).

24. United States Casualty Co. v. Anderson Electric Car Co., 157 N. Y. S. 710 (1916).

that the loss under its policy was due to the negligence of the defendant. Thereafter, without a formal order being made, the assured was dropped from the case as a party. The court held that after the assured had been dropped from the case as a party, the defendant was acting within its constitutional rights in demanding trial by jury.[25]

§ 959. Judgment. (a) Excessive.

Where the policy provided that the amount due should be fifty precent of the list price, which was $2,397, and company's record book showed that the amount should not be more than $1,070, judgment for $1,070 with interest for loss of burned car after being stolen was not excessive.[26]

§ 960. Judgment. (b) Collateral attack.

Taxicab operator's indemnity insurer is estopped from collaterally attacking default judgment against it by motion to open. The insurer's liability on "final determination of litigation after trial of issue" is conditionally fixed by trial judgment, subject to reversal on appeal.[27]

§ 961. Judgment. (c) Insolvent judgment creditor.

Where policy indemnified insured "against loss arising or resulting from claims for damages on account of bodily injuries" and insured was insolvent and never paid any of a judgment rendered against him, party securing judgment could not recover from the insurer, since the policy did not cover liability for loss.[28]

25. United States Casualty Co. v. Anderson Electric Car. Co. (N. Y. App. Div.), 157 N. Y. S. 710 (1916).

26. Lorenz v. Bull Dog Automobile Ins. Ass'n (Mo. App.), 277 S. W. 596 (1925).

27. N. Y. Law Par. 282-b added by Laws 1922, ch. 12, amended by Laws 1924, ch. 360, par. 12, and ch. 413, par. 1, and Laws 1925, ch. 315; Pope v. Red Cab Mutual Casualty Co., 128 Misc. Rep. 456, 219 N. Y. S. 135 (1926).

28. Transylvania Casualty Ins. Co. v. Williams, 209 Ky. 626, 273 S. W. 536 (1925).

§ 962. Judgment. (d) Interest.

Where the amount of the judgment exceeds the indemnity policy, the insurer is only obligated to pay the amount of the policy, with interest on that amount and not on the full amount of the judgment, with costs and disbursements taxed in the action.[29]

§ 963. Judgment. (e) Costs—Deductible clause.

Where a policy contained a clause that the assured would assume the initial loss of $25.00, judgment by default was erroneously entered for the full amount. When judgment was modified deducting $25 from the amount, the question of costs was not affected.[30]

29. Devlin v. New York Mutual Casualty Taxicab Ins. Co., 125 Misc. 784, 206 N. Y. S. 365, aff'd with modifications, 213 App. Div. 152, 210 N. Y. S. 57 (1925).

30. Stanton v. Aetna Accident and Liability Co., 162 N. Y. S. 333 (1917).

CHAPTER XXVI.

MUTUAL ASSOCIATIONS AND RECIPROCALS.

A. MUTUAL ASSOCIATIONS.

SECTION.
964. In general.
965. Rules of association—Transfer.
966. Approval of policy forms by superintendent of insurance.
967. Assessments and liquidation.
968. Statute—Attorney fees.
969. Waiver—Defense of action—By-laws.

B. RECIPROCAL OR INTERINSURANCE EXCHANGE.

970. In general.
971. Contract one of insurance.
972. Limitation of authority.
973. "Reciprocal" and "Mutual" distinguished.
974. Estoppel.
975. Receiver.
976. (a) Parties.
977. (b) Creditor's bill proper remedy.
978. Negotiations for settlement—Failure to deny liability—Waiver.
979. Right of action.

A. MUTUAL ASSOCIATIONS.

§ 964. In general.

Provision is made by statute in some states for writing automobile insurance other than public liability by mutual associations.[1] Certificates of membership or policies are issued, and payments are made on the cash or installment plan, subject to assessments.[2] The rights of the insured are

1. New York Ins. Law, Art. 10-B, added by Laws 1916 ch. 13, as amended (secs. 340-350); Palmer v. Bull Dog Auto. Ins. Ass'n, 294 Ill. 287, 128 N. E. 499 (1920); Michigan Comp. Laws 1922, sec. 9100 (259-262); Kansas R. S. 40-901 to 40-909; Emerson v. Western Automobile Indemnity Ass'n, 105 Kan. 242, 182 Pac. 647; Olson v. Western Automobile Ins. Co., 115 Kan. 227, 222 Pac. 104 (1924); Walters v. Western Automobile Ins. Co., 116 Kan. 404, 226 Pac. 746 (1924); Beha v. Gale, 129 Misc. 858, 223 N. Y. S. 253 (1927); Cooper v. Belt Automobile Indemnity Ass'n, 79 Pa. Super. Ct. 479.

2. Olson v. Western Automobile Ins. Co., 115 Kan. 227, 222 Pac. 104 (1924).

governed by the certificates and by-laws of the association.[3] Where the by-laws provide a forfeiture within a stated period after notice to pay assessment, and assessment is not paid, there is a forfeiture without further action by the association.[4] A request for payment of past due assessments after the expiration of the period for payment does not operate to waive the forfeiture.[5]

§ 965. Rules of association—Transfer.

The rules of a voluntary association for indemifying automobile owners for losses must be complied with to create liability. Thus, where an association's rules provided that in the event that the subscriber disposed of his car, purchased another and desired that the new car be covered, he was required to give notice to the association, and if acceptable to the attorney in fact, a rider would be attached to the subscriber's certificate, upon payment of the required fee, it was held that there was no liability where the subscriber whose second car had been stolen failed to make application to the attorney in fact for new coverage.[6]

§ 966. Approval of policy forms by superintendent of insurance.

A mutual automobile association of Kansas, organized under a statute which required that policy forms should be approved by the state superintendent of insurance, issued policies which discriminated in favor of the holders, both as to coverage and the rate, without submitting the form to the superintendent of insurance for his approval. The superintendent of insurance thereupon ordered the policies cancelled. Pursuant to the order of the superintendent of insurance and in conformity with a provision of the by-laws reserving such right, the board of directors cancelled the policies. The court held that the policies were issued in violation of law and having been legally cancelled the policy-

3. Olson v. Western Automobile Ins. Co., 115 Kan. 227, 222 Pac. 104 (1924).
4. Cooper v. Belt Automobile Indemnity Ass'n, 79 Pa. Super. Ct. 479.
5. Palmer v. Bull Dog Auto. Ins. Ass'n, 294 Ill. 287, 128 N. E. 499.
6. Palmer v. Bull Dog Auto. Ins. Ass'n, 294 Ill. 287, 128 N. E. 499 (1920).

holders did not have any right to peremptory writ of mandamus to compel compliance with their demand for inspection of the books.[7]

But policies issued upon forms not approved by the superintendent of insurance are valid until cancelled, and the company is liable for any loss that may occur;[8] but the subscriber is not entitled to the return of premium for past insurance.[9]

§ 967. Assessments and liquidation.

Provision that no member shall be assessed, except for losses or expenses incurred while he was a member, nor unless notified within year after expiration of policy, was held *ultra vires* under New York Insurance Laws, Par. 246, added by Laws 1916, ch. 13, and amended by Laws 1922, ch. 417, Par. 9.[10]

Insurance Laws, Par. 346 (added by Laws 1916, ch. 13), as it existed before its amendment by Laws 1922, ch. 417, Par. 9, providing that every member of mutual automobile casualty insurance company shall be liable for his proportionate part of any assessment, made in accordance with law and his contract, for losses and expenses incurred while he was a member, if he is notified of such assessment within one year after the expiration of his policy, was a statute of limitations, and under statutory construction, Laws Par. 24, amendment thereof by Laws 1922, ch. 417, without any reservation affecting preceding contracts, applied to policies executed before amendment was adopted.[11]

Failure to serve notice of assessment on member of mutual casualty company within one year after cancellation of his policy did not bar recovery of assessment by super-

7. Olson v. Western Automobile Ins. Co., 115 Kan. 227, 222 Pac. 104 (1924).
8. Walters v. Western Automobile Ins. Co., 116 Kan. 404, 226 Pac. 746 (1924).
9. Walters v. Western Automobile Ins. Co., 116 Kan. 404, 226 Pac. 746 (1924).
10. Beha v. Gale, 129 Misc. 858, 223 N. Y. S. 253 (1927).
11. Beha v. Gale, 129 Misc. 858, 223 N. Y. S. 253 (1927).

intendent of corporations where provision of policies purporting to limit members' liability was *ultra vires*.[12] It does not apply to liquidation proceedings.[13]

§ 968. Statute—Attorney fees.

Kansas statute which authorizes allowance of attorney's fees in all actions in which judgment is rendered against an insurance company on policies insuring personal property, includes a mutual indemnity association.[14]

§ 969. Waiver—Defense of action—By-laws.

Where policy and by-law made payment in money by policyholder of his loss or expense after trial of the issue a condition precedent to right of recovery, the condition was not waived or forfeited because insurer defended the action pursuant to by-law of company.[15]

B. RECIPROCAL OR INTERINSURANCE EXCHANGE.

§ 970. In general.

Individuals, partnerships and corporations, designated as subscribers, are authorized by the laws of some states to exchange automobile reciprocal or interinsurance contracts with each other, providing insurance among themselves. The organization under which subscribers so exchange contracts are usually termed reciprocal or interinsurance exchange.[16] Contracts are usually executed by an attorney,

12. Beha v. Gale, 129 Misc. 858, 223 N. Y. S. 253 (1927).

13. Beha v. Weinstock, 247 N. Y. 221, 160 N. E. 17 (1928), rev'g 221 App. Div. 882, 224 N. Y. S. 754, aff'g 129 Misc. 337, 221 N. Y. S. 500.

14. Stanley v. Belt Automobile Indemnity Ass'n, 112 Kan. 412, 210 Pac. 1096 (1923).

15. Emerson v. Western Autombile Indemnity Ass'n, 105 Kan. 242, 182 Pac. 647 (1919).

16. Gen'l Laws of California, 1923, Act 3734, sec. 1. See Indiana Reciprocal Ins. Act (Acts 1919, p. 503, ch. 102; Burns' 1926, secs. 9308-9321); Ohio Gen. Code, secs. 9556-1; Pennsylvania Act of June 27, 1913, P. L. 634 Laws of 1921 P. L. 682, 774; Kentucky Stats. sec. 743, -1-12; Kansas R. S. 40-901 to 40-909; New York Ins. Law, Art. 10-A, added by Laws 1916, ch. 14 (secs. 320-329);

agent or other representative designated as attorney, who is duly authorized to act for the subscribers under powers of attorney. Such attorney may be a corporation. The power of attorney and contracts thereunder may provide for the right of substitution and revocation and impose such restrictions upon the exercise of the power granted as may be agreed upon by the subscribers, including the right to fix the contingent liability of the subscribers, for the payment of losses in excess of the available cash funds in the possession of the exchange, and may further provide for the exercise of any right reserved to the subscribers directly or through a board or other body which is selected under rules and regulations adopted by the subscribers. The board or other body usually has supervision over the finances of the exchange and over its operations to the extent that said operations shall be in conformity with the subscriber's agreement and power of attorney.[17] The exchange may sue or be sued in its own name, but any judgment rendered is usually only binding upon each subscriber in such proportion as his interest may appear upon the date that the cause of action arose.[18]

§ 971. Contract one of insurance.

A contract whereby an indemnity company acting as attorney-in-fact for certain "subscribers" to automobile insurance becomes the medium by which each subscriber ful-

Underwriters' Exch. v. Indianapolis Street Railway Co. (Ind. App.), 146 N. E. 860; William Penn Motor Indemnity Exch. v. Haddad, 86 Pa. Super. Ct. 307 (1925); Pickering v. Alyea-Nichols Co. (C. C. A. 7th Circ. 21 Fed. (2d) 501 (1927), rev. Alyea-Nichols v. United States, 12 Fed. (2nd) 998; Irwin v. Missouri Valley Bridge & Iron Co., 19 Fed. (2d) 300 (1927); Standard Auto. Ins. Ass'n v. Henson, 201 Ky. 230; Standard Automobile Ins. Ass'n v. Russell, 199 Ky. 470 (1923); Ginsburg v. Bull Dog Automobile Fire Ins. Ass'n, 328 Ill. 571, 160 N. E. 145, rev. 237 Ill. App. 656 (1928); Grossman v. Nichols, 223 Ill. App. 297 (1921); Cook Motors Corp. v. Casualty Ass'n of America, 239 Mich. 362, 214 N. W. 212 (1927); Michigan Automobile Ins. Exchange v. Vaughan, 19 Ohio Appeals, 149 (1923).

17. Gen'l Laws of California, 1923, Act 3734, sec. 2.

18. Gen'l Laws of California, 1923, Act 3734, sec. 3.

fills his obligation to indemnify each of his fellow subscribers who suffer a loss and receive from each of his fellow subscribers the indemnity to which he is entitled, is one of insurance. In such a case, the indemnity company acts not as the agent of the subscribers, but as an insurance company. It is subject to the insurance laws of the state, and liable for their violation.[19]

A policy of insurance signed in the name "New Jersey Indemnity Co., Attorney in Fact, E. M. Carroll, President" and providing that "subscribers to motor car underwriter the New Jersey Indemnity Exchange severally agree to indemnify," etc., is to be construed as a contract of insurance by the New Jersey Indemnity Company, acting not as agent for the subscribers but as an insurance company in which the subscribers were interested much as stockholders liable to contribute a certain amount by way of subscription to the liabilities of the indemnity company from time to time. Where the principals were not named, the attorney in fact was liable.[20]

An automobile insurance exchange which has complied with the statutory requirements[21] in the state of Washington is a company authorized to do an insurance business, even though it is not incorporated and has no charter.[22]

§ 972. Limitation of authority.

Reciprocal company or interinsurance exchange usually is not authorized to write automobile public liability insurance.[23] Thus in an Ohio case it was held that the reciprocal or interinsurance exchange law related only to fire insurance so far as "reciprocal" insurance was concerned.[24]

19. State v. New Jersey Indemnity Co., 95 N. J. L. 308, 113 Atl. 491 (1921).

20. Solomon v. New Jersey Indemnity Co., 94 N. J. L. 318, 110 Atl. 813 (1920), aff'd 95 N. J. L. 545, 113 Atl. 927.

21. Washington Rem. Code secs. 6059-85.

22. State ex rel. Automobile Insurance Exchange v. Kuykendall, 119 Wash. 235, 205 Pac. 392 (1922).

23. Gen'l Laws of California, 1923, Act 3734, Ohio Gen. Code, secs. 9556-1

24. State ex rel. Automobile Underwriters v. Gearheart, 103 Ohio St. 263, 132 N. E. 735 (1921).

§ 973. "Reciprocal" and "Mutual" distinguished.

It was held in an Ohio case that the reciprocal or inter-insurance exchange law did not come within the purview of a subsection of the statute dealing with mutual insurance companies, providing for "automobile insurance against loss, expense, and liability resulting from the ownership, provided no policies shall be issued under this subsection maintenance, or use of any automobile or other vehicle, against the hazard of fire alone." In other words, a "reciprocal" was construed not to be a "mutual" company.[25]

§ 974. Estoppel.

Reciprocal insurance association is estopped from denying liability on ground that officer subscribing for insurance had no authority to sign on insured's behalf, after accepting payment of premium on policy and negotiating for settlement of losses.[26]

§ 975. Receiver.

Appointment of receiver for reciprocal insurance exchange was held void in Indiana, for such exchange was merely a place where subscribers for insurance exchanged their contracts of indemnity through their attorney in fact, and not a corporation or legal entity.[27] But a different rule has been applied in federal court.[28]

§ 976. Receiver. (a) Parties.

For purpose of action on note and foreclosure of mortgage together constituting guaranty fund for subscribers reciprocal automobile insurance, subscribers for insurance and not their attorney in fact were the real parties in inter-

25. State ex rel. Automobile Underwriters v. Gearheart, 103 Ohio St. 263, 132 N. E. 735 (1921).

26. Cook Motors Corp v. Casualty Ass'n of America, 239 Mich. 362, 214 N. W. 212 (1927).

27. Turner v. Henshaw, 86 Ind. App. 565, 155 N. E. 222 (1927).

28. Irwin v. Missouri Valley Bridge & Iron Co. (C. C. A. 7th Circ.) 19 Fed. (2d) 300 (1927).

est, in view of failure of either reciprocal Insurance Act (Burns' Ann. St. 1926, Par. 9308-9321), or powers of attorney to authorize attorney in fact to sue on behalf of subscribers.[29]

§ 977. Receiver. (b) Creditor's bill proper remedy.

Proper remedy to recover on note and to foreclose mortgage securing it, which together constituted guaranty fund for subscribers to reciprocal automobile insurance, was a proceeding in the nature of a creditor's bill. Note and mortgage given as guaranty fund for subscribers reciprocal insurance, under such circumstances was held taken by attorney in fact of subscribers, not as trustee of an express trust for the subscribers, but as attorney in fact for those subscribers who might become owners thereof, and for the benefit of those becoming entitled.[30]

§ 978. Negotiations for settlement.—Failure to deny liability—Waiver.

Reciprocal insurance company waives its defense based on misrepresentations made in schedule as to title, where it has accepted policies and negotiated for settlement of losses occurring thereon, with no suggestion of denial of liability on its part.[31]

§ 979. Right of action.

Authority of plaintiff to sue tort feasor who was responsible for the collision was not shown by complaint of attorney in fact for automobile reciprocal insurers who paid the loss.[32]

29. Turner v. Henshaw, 86 Ind. App. 565, 155 N. E. 222 (1927).

30. Turner v. Henshaw, 86 Ind. App. 565, 155 N. E. 222 (1927).

31. Cook Motors Corp. v. Casualty Ass'n of America, 239 Mich. 362, 214 N. W. 212 (1927).

32. Underwriters' Exch. v. Indianapolis Street Ry. Co. (Ind. App.), 146 N. E 860 (1925).

TABLE OF CASES.

[References are to sections.]

A.

SECTION.

Abrahamson v. Hartford Fire Ins. Co. 76
Aetna Ins. Co. v. Indiana National Life Ins. Co. 403
Affleck v. Potomac Ins. Co. 118, 131, 144, 188, 190, 564
Akin v. Lee 952
Alexander v. Home Ins. Co. of Hawaii 26, 710, 715, 726, 727
Allen v. Aetna Life Ins. Co. 786
Allen & Arnink Automobile Renting Co. v. United Traction Co. 469, 952
Alliance Ins. Co. v. Enders 403
Alliance Ins. Co. v. Williamson 20, 237, 266, 442, 460, 461, 464, 467
Alpin v. Smith 796
Alsup v. Jordan 678
Althoff v. Torrison 956
American Assurance Co. v. Jaymes 250
American Automobile Indemnity Co. v. Baker 26, 709
American Automobile Ins. Co. v. Clark 476, 479
American Automobile Ins. Co. v. Cone 786, 789, 790, 796, 800, 931
American Automobile Ins. Co. v. Fox 762
American Automobile Ins. Co. v. Ins. Commissioner 768
American Automobile Ins. Co. v. Shapiro 552, 560, 567
American Automobile Ins. Co. v. Struwe 800, 811, 844
American Automobile Ins. Co. v. United Railways Co. 469
American Automobile Ins. Co. v. Watts 331, 334
American Can Co. v. Agricultural Ins. Co. of Watertown, New York 35
American Central Ins. Co. v. Buchanan-Vaughan Automobile Co. 90, 96, 188, 191, 538
American Central Ins. Co. v. Weller 469, 491, 752, 753
American Employers' Liability Ins. Co. v. Fordyce 778
American Fidelity Co. v. Bleakley 768
American Ins. Co. v. Jueschke 95, 258, 552, 533, 606, 702
American Ins. Co. v. Ott 292, 402, 403
American Surety Co. of New York v. Pauly 27
Ames v. Automobile Owners' Ins. Co. 57, 60, 67
Anderson v. United States Fire Ins. Co. 234, 250, 299
Andrews v. Bull Dog Automobile Fire Ins. Ass'n of Chicago 57, 127, 142, 171, 191, 278 279
Appel v. People's Surety Co. 786
Aqua Contracting Co. v. United Rys. Co. of St. Louis 952

[References are to sections.]

SECTION.

Armstrong v. Agricultural Ins. Co. 87, 88
Arrott v. Walker 3
Arthur v. Morgan 678
Ashley v. Ryan 5
Atlanta Cadillac Co. v. Manley 469
Atlante Campagna v. Newark Fire Ins. Co. 131, 144
Atlas Assurance Co. v. Williams 440
Attorney General v. North America Life Ins. Co. 131, 144
Aubertin v. Northern Assurance Co. 441
Auerbach v. Maryland Casualty Co. 875, 876
Automobile Finance Corporation v. British & Federal Fire Underwriters .. 27
Automobile Finance & Securities Co. v. Globe Indemnity Co. 288, 626, 752, 753, 754
Automobile Ins. Co. v. Braun 477
Automobile Ins. Co. of Hartford v. Guaranty Securities Corporation 344
Automobile Ins. Co. of Hartford v. Lewis 52, 548, 507, 508, 572
Automobile Ins. Exchange v. Southern Motor Sales Co. 27, 585, 586, 598
Automobile Ins. Exchange v. Wilson 90, 110, 119, 163, 200, 243, 252, 254
Automobile Outing Co. v. McFrederick 36, 44, 45, 105
Automobile Owners' Ins. Ass'n v. Hennesey 144
Automobile Owners' Protective Exchange of Kankakee, Ill. v. Edwards 366, 469, 486, 487, 510, 533, 887
Automobile Underwriters v. Gearheart 972, 973
Automobile Underwriters of America v. Radford ... 27, 351, 368, 547, 582, 640
Automotive Collateral Co. v. J. F. Huntzinger Co. 583
Automotive Co. v. National Fire Ins. Co. of Hartford 314, 528

B.

B. & B. Trucking Inc. v. Home Fire & Marine Ins. Co. of California .. 331, 339
Bacot v. Phoenix Ins. Co. of Brooklyn 53
Baker v. Northern Assurance Co. 22, 208, 212, 214, 251, 331, 372
Baker v. North River Ins. Co. 106, 336, 337, 212
Ballard v. Globe & Rutgers Fire Ins. Co. 217, 239
Bankers Financial Corporation v. Canada Accident & Fire Assurance Co. 650, 651, 652
Barnett v. London Assurance Corporation 24, 249, 494
Barney v. Preferred Automobile Ins. Exchange 779, 780
Barron v. Burnside 5
Basta v. United States Fidelity & Guaranty Co. 893, 897
Bausman v. Credit Guarantee Co. 792
Beckley v. National Ins. Co. 217, 218, 223, 264
Beha v. Gale 964, 967
Bell v. American Ins. Co. 26, 708, 711, 726, 728, 732
Bell v. Hanover Fire Ins. Co. 18, 254, 370, 535, 640, 752, 753
Bell v. Weiner 807, 812, 813, 844

[References are to sections.]

	SECTION.
Belleview Trading Co. v. International Indemnity Co.	349, 635, 642, 899
Bellman v. Home Ins. Co.	290, 315
Belt Automobile Indemnity Ass'n v. Ensley Transfer & Supply Co.	840, 847
Bennett v. Northwestern National Ins. Co.	76, 116, 217, 237, 268
Bennis Sheen Transfer v. Georgia Casualty Co.	832
Benvenuto v. Central Manufacturers' Mutual Ins. Co.	131
Berry v. Equitable Fire & Marine Ins. Co.	115, 144
Berryman v. Maryland Motor Car Ins. Co.	204
Bigus v. Pacific Coast Casualty Co.	592
Billet v. Pennsylavnia Fire Ins. Co.	659
Bird v. St. Paul Fire & Marine Ins. Co.	400, 587, 606
Blaback v. Blachsher	952
Blake v. McClung	2
Bloom v. Ohio Farmers' Ins. Co.	131, 132, 140, 200, 585 614, 675
Board of Trade Livery Co. v. Georgia Casualty Co.	893, 897
Boling v. Ashbridge	786, 800, 859, 860
Boston Store v. Hartford Accident & Indemnity Co.	76, 825, 832, 881
Bott v. Westchester Fire Ins. Co.	407
Boyle v. Manufactures' Liability Ins. Co.	909, 914
Boyle v. United States Fire Ins. Co.	92, 216
Boyle v. Yorkshire Ins. Co.	349, 395, 625
Bradley v. Illinois Automobile Ins. Exchange	779, 836, 864
Bradley v. Retailers' Fire Ins. Co.	21
Brain v. Atkins	786
Braun v. Bell	952
Brinkman v. Western Automobile Indemnity Ass'n	853, 886
Bro v. Moran	807
Brock v. Travelers Ins. Co.	933, 935
Bromberg v. Ft. Dearborn Casualty Underwriters	709
Brown v. British Columbia Electric Ry. Co.	483
Brown v. Firemen's Ins. Co.	403
Brown v. International Indemnity Co.	202, 203, 501, 676
Brown v. Union Indemnity Co.	712, 726
Browne v. Commercial Union Assurance Co. of London	57, 61, 98, 552, 560, 561
Bryson v. International Indemnity Co.	805
Buck v. Stuyvesant Ins. Co. of City of New York	81, 83, 217
Buckley v. Citizens' Ins. Co.	338
Buell v. United Firemen's Ins. Co.	49, 469, 490, 663
Bull Dog Automobile Fire Ins Ass'n v. Brown	369
Bull Dog Automobile Ins. Co. v. Crowley	138, 636, 642
Burgess v. Germany-Roy-Brown Co.	952
Bush v. Boston Ins. Co.	587
Buxton v. International Indemnity Co.	46, 400, 692
Buysse v. Connecticut Fire Ins. Co.	203
Byalos v. Matheson	469, 484, 952

[References are to sections.]

C.

SECTION.

Callahan v. London & Lancashire Fire Ins. Co.....402, 416, 445, 630, 680
Camden Fire Ins. Ass'n v. Clayton..... 656
Camden Fire Ins. Ass'n v. Prezioso.....477, 479
Camden Fire Ins. Co. v. Hill.....31, 35
Campbell v. London & Lancashire Indemnity Co..... 794
Campbell v. National Fire Ins. Co.....50, 348, 385, 401, 402, 405, 414, 418, 441
447, 529, 625, 703
Cancilla v. Firemen's Fund Ins. Co.....496, 743, 647
Capelle v. United States Fidelity & Guaranty Co.....779, 795, 954
Cardwell v. City of New York Ins. Co.....112, 157, 176, 183, 262, 522
Carroll v. Union Marine Ins. Co.....57, 60, 76, 111, 159, 400, 543, 666
Carter v. Aetna Ins. Co..... 786
Carter v. Walker..... 952
Cass v. Lord.....26, 29, 32, 37, 38, 59, 571
Cayard v. Robertson.....786, 790
Center Garage Co. v. Columbia Ins. Co.....206, 348, 740, 741
Champion Automobile Co. v. Commonwealth Ins. Co..... 69
Chapin v. Ocean Accident & Guarantee Corporation.....822, 823
Chepakoff v. National Ben Franklin Fire Ins. Co..... 617
Chisholm v. Royal Ins. Co.....60, 69, 71, 365
Christian & Brough Co. v. St. Paul Fire & Marine Ins. Co.....85, 571, 904, 943
Christiansen v. Bankers' & Shippers' Ins. Co.....192, 312, 318, 549, 629, 642
661, 698
Chrysler Sales Corporation v. Smith, Comm's.....12, 62
Chrysler Sales Corporation v. Spencer..... 48
Clark v. London Assurance Corporation..... 394
Clark v. Union Mutual Fire Ins. Co..... 144
Clower v. Fidelity-Phoenix Fire Ins. Co.....208, 212, 294
Coblentz v. Jaloff..... 952
Coderre v. Travelers Ins. Co.....897, 808
Coffin v. Northwestern Mutual Fire Ins. Ass'n.....22, 236
Cohen v. Chicago Bonding & Ins. Co..... 735
Cohen v. Ft. Dearborn Casualty Underwriters.....142, 325, 441, 444, 463
Coleman v. New Amsterdam Casualty Co..... 864
Collins v. Phoenix Assurance Co.....203, 426, 432
Collins' Exrs. v. Standard Accident Ins. Co.....863, 867
Columbia Ins. Co. v. Chatterjee.....711, 718
Collum v. National Fire Ins. Co.....218, 221, 261
Colyer v. Accident Ins. Co. of North America..... 26
Combs v. Hunt.....786, 787, 789, 796, 800, 804, 842, 891
Commercial Union Assurance Co. of London v. Hill.....188, 204
Commercial Union Assurance Co. v. Lyon & Kelly..... 260

[References are to sections.]

SECTION.

Commonwealth v. Henry 933
Commonwealth v. Vrooman 3
Connolly v. Bolster 786
Conover v. Bloom 952
Conqueror Z. & L. Co. v. Aetna Life Ins. Co. 786
Conroy v. Commercial Casualty Ins. Co. 863, 865
Continental Automobile Ins. Ass'n v. International Motor Co. 475, 484
Continental Casualty Co. v. Paul 719, 749
Continental Ins. Co. v. Burns 278, 402, 423
Continental Ins. Co. v. Dillow 618, 752
Continental Ins. Co. v. Michaels 217, 232, 235
Conwell v. Hays 796
Conyers v. Yorkshire Ins. Co. 217, 237, 239, 267
Cook Motors Corporation v. Casualty Ass'n of America 289, 970, 974, 978
Cooper v. Belt Automobile Indemnity Ass'n 964
Cooper v. General Accident Fire & Life Assurance Coropration 293
Corporation of Roman Catholic Church of Eunice v. Royal Ins. Co. 38
Corporation of Royal Exchange Assurance of London v. Puckett 89, 111
606, 615, 617
Corrigan v. National Motor Underwriters 32
Corwin v. Salter 831
Cory v. International Indemnity Co. 18, 217
Cottingham v. Maryland Motor Car Ins. Co. 217, 218, 225
Councill v. Sun Ins. Office of London 69, 73, 366, 367, 521, 697
Cranston v. California Ins. Co. 31, 76, 77, 217, 231, 234
Craufurd v. Hunter 16
Crowell v. Maryland Motor Car Ins. Co. 26, 27, 204
Crown Point Iron Co. v. Aetna Ins. Co. 331, 334

D.

Daggs v. Orient Ins. Co. 5, 321
Dahms & Sons Co. v. German Fire Ins. Co. 25
Daniels v. Hudson River Fire Ins. Co. 114
Davern v. American Mutual Liability Ins. Co. 29, 38, 86, 120
Davidson v. American Central Ins. Co. 130, 218, 272, 278, 289, 311
Davis v. Home Ins. Co. 31, 284
Davis v. Yorkshire Ins. Co. 655
Dawsons Ltd. v. Bonnin 190
Day v. National Fire Ins. Co. 217
Day v. St. Paul Fire & Marine Ins. Co. 56, 75, 76, 118, 128, 129, 144, 160
162, 174
Dealers' Security Corporation v. Michigan Automobile Ins. Co. 654
Deckhart v. Globe & Rutgers Fire Ins. Co. 453
Delafield v. London & Lancashire Fire Ins. Co. 597

[References are to sections.]

SECTION.

Demarest v. Flack 768
Denney v. Franklin Fire Ins. Co. 119
Denny v. Royal Indemnity Co. of New York 941
De Shields v. Ins. Co. of North America 212, 213, 294, 296
Devenny v. Automobile Owners' Interinsurance Ass'n 87, 89, 133, 165
Devlin v. New York Mutual Casualty Taxicab Ins. Co. 827, 844, 963
Devoto v. United Automobile Transportation Co. 811
Dickenson v. Belt Automobile Indemnity Co. 131
Dickenson v. Maryland Casualty Co. 27, 844, 929
Di Francesco v. Zurich General Accident & Liability Ins. Co. 832
Dimmick v. Aetna Ins. Co. 208
Dimmick v. Illinois Automobile Fire Ins. Exchange 212
Doerr v. National Fire Ins. Co. of Hartford 87, 88, 110, 168, 176, 402, 407
654, 655, 657, 664, 665, 666
Dogmen F. Co. v. Niagara Fire Ins. Co 413
Dougherty v. Ins. Co. of North America 716
Douglas v. Ins. Co. of North America 67, 69, 148
Doyle v. Continental Ins. Co. 5
Downs v. Georgia Casualty Co. 42
Drew v. American Automobile Ins. Co. 346, 522
Ducommun v. Strong & Inter-State Exchange 41, 779, 780, 807
Dufresne v. Marine Ins. Co. 451, 639
Duke v. Parker 952

E.

Eagle, Star & British Dominions Ins. Co. v. Main 261
Eastside Garage v. New Brunswick Fire Ins. Co. 300, 302, 515
Eberhardt v. Federal Ins. Co. 451
Eberlein v. Fidelity & Dep. Co. 786
Eckert v. Joice 32, 800
Eddy St. Iron Foundry v. Hampden Stock & Mutual Fire Ins. Co. 117
Edwards v. Maryland Motor Car Ins. Co. 627
Elder v. Federal Ins. Co. 110, 202, 203
Elliott v. Belt Automobile Asss'n 779, 680, 795
Elliott v. Fidelity-Phoenix Fire Ins. Co. of New York 328, 458, 462, 546
Emerson v. Western Automobile Indemnity Ass'n 504, 786, 790, 940, 951
964, 969
Empire State Surety Co., Matter of, ... 844
Employers' Fire Ins. Co. v. Consolidated Garage & Sales Co. 493
Ems v. Continental Automobile Ins. Ass'n 873
Engler v. Hatton 952
Erickson v. American Ins. Co. 278

F.

Fabregas v. Porto Rican & American Ins. Co. 711
Falls City Plumbing Supply Co. v. Potomac Ins. Co. 390, 391, 392

[References are to sections.]

	SECTION.
Farber v. American Automobile Ins. Co.....76, 81, 130, 131,	143
Farmer v. Union Ins. Co. of Indiana.....469,	486
Farrell v. Merchants Mutual Automobile Liability Ins. Co.....827, 832,	834
Federal Ins. Co. v. Hiter.....27, 596, 610, 627,	752
Federal Ins. Co. v. Munden.....495,	696
Felakos v. Aetna Ins. Co.....	144
Fenton v. Poston.....779, 780,	804
Fentress v. Rutledge.....779,	787
Ferry v. National Motor Underwriters.....291, 834,	949
Fidelity & Casualty Co. v. Martin.....786,	790
Fidelity & Deposit Co. of Maryland v. Moore.....53,	753
Fidelity Lloyds of America v. Geddie.....	667
Fidelity Mutual Life Ass'n of Philadelphia v. Mettler.....	2
Fidelity-Phoenix Fire Ins. Co. v. Mumaw.....	451
Fidelity-Phoenix Fire Ins. Co. v. Oldsmobile Sales Co.....348, 400, 603, 625, 642,	604 752
Fidelity-Phoenix Fire Ins. Co. v. Queen City Bus & Transfer Co.....27,	131
Finkelberg v. Continental Casualty Co.....797, 806,	844
Finley v. United States Casualty Co.....	876
Finn v. Indemnity Co. of America.....348,	625
Fire Ass'n of Philadelphia v. Moss.....	107
Fireman's Fund Ins. Co. of California v. Vinton.....	695
Fireman's Fund Ins. Co. v. Globe Navigation Co.....	27
Fireman's Fund Ins. Co. v. Haley.....370, 735, 901,	921
Fireman's Ins. Co. of Newark v. Savery.....711, 718,	720
Fireman's Ins. Co. of Newark v. Rye.....204, 403,	407
First National Bank v. National Liberty Insurance Co.....	307
Fiske v. Niagara Fire Ins. Co. of New York.....19,	601
Fitch v. City of Festus.....	522
Flanagan v. Forest.....	792
Fleming v. Hartrick.....	952
Flynn v. General Accident Fire & Life Ins. Corporation.....	711
Fodor v. National Liberty Ins. Co.....31,	34
Fodor v. National Mutual Automobile Ins. Co.....	400
Folgar v. Home Ins. Co.....	591
Ford v. Aetna Life Ins. Co.....786,	790
Ford v. Stevens Motor Car Co.....775,	826
Fox v. Interstate Exchange.....712,	731
Franklin Fire Ins. Co. v. Britt.....65, 132, 141, 274, 402,	407
Freiberger v. Globe Indemnity Co.....	733
French, British & Mercantile Ins. Co. v. Tye.....	25
Frye v. Bath Casualty Co.....	876
Fullerton v. United States Casualty Co.....26, 27, 552, 841, 843, 879, 882,	916

[References are to sections.]

G.

SECTION.

Gaffey v. St. Paul Fire & Marine Ins. Co. 355
Gallagher v. American Alliance Ins. Co. 391, 394, 428
Gardner v. Cooper 792
Garford Motor Truck Co. v. Miller's National Ins. Co. 26, 479, 420, 708, 716, 719
Gaudy v. North American Home Ins. Co. 38
Gaudy (O. M.) Inc. v. North Carolina Home Ins. Co. 18, 628, 752
General Accident, Fire & Life Assurance Corporation v. Butler's Ice Cream Factory 821, 822
German Alliance Ins. Co. v. Lewis 4
Geyler (Louis) Co. v. Baker 49
Gibbes Machinery Co. v. Niagara Fire Ins. Co. 297
Gibson v. Georgia Life Ins. Co. 717, 725
Gibson v. Glens Falls Ins. Co. 348, 349, 359, 625
Giles v. Citizens Ins. Co. of Missouri 24, 176, 178, 249, 678
Ginsburg v. Bull Dog Automobile Fire Ins. Ass'n 970
Glaser v. Williamsburg City Fire Ins. Co. 30, 396, 401
Glatz v. General Accident, Fire & Life Assurance Corporation 586, 789, 790
Glens Falls Ins. Co. v. Jacobs 532
Glens Falls Ins. Co. v. Stewart 585, 587, 588
Globe Indemnity Co. v. Martin 796, 807
Globe & Rutgers Fire Ins. Co. v. Jewell-Loudermilk Co. 452
Globe & Rutgers Fire Ins. Co. v. Smyly 218
Goerss v. Indemnity Co. of America 779, 780, 783
Goldberg v. Employers' Liability Assurance Co. 441, 643
Gold Life Ins. Co. v. Johnston 117
Goodell v. Union Automobile Ins. Co. 124, 227, 637
Goodman v. Georgia Life Ins. Co. 786, 790, 791, 795, 796
Gordon v. Ins. Co. of North America 404
Gormley v. Westchester Fire Ins. Co. 18, 24, 69, 249, 407
Gortz v. Ravenel 952
Gough v. Toronto & Y. Radial R. Co. 483
Gould v. Brock 776
Graham v. Ins. Co of North America 731, 764
Graham v. Standard Fire Ins. Co. 57, 89, 204
Grantham v. Royal Ins. Co. 87, 100, 231, 251, 26
Great American Mutual Indemnity Co. v. Jones 729
Great American Mutual Indemnity Co. v. Meyer 27, 752
Great Eastern Casualty Co. v. Solinsky 712, 731
Green River Distilling Co. v. Walker-Smith Co. 856
Greentaner v. Connecticut Fire Ins. Co. 87
Greer-Robbins Co. v. Pacific Surety Co. 838, 849
Griessel v. Adler 952

[References are to sections.]

SECTION.

Griffin v. General Casualty & Surety Co.....27, 784, 792
Gross v. Germania Fire Ins. Co.....350, 443, 444
Grossman v. Nichols..... 870
Guaranty Plan Corporation v. Mechanics & Traders..... 660
Guerin v. Indemnity Ins. Co. of North America.....805, 863
Guglielmetti v. Graham.....783, 796, 799
Gulf Finance & Security Co. v. Atlas Assurance Co..... 752
Gunn v. Globe & Rutgers Fire Ins. Co..... 604

H.

Hall v. Miller.....331, 334, 335
Hamblin (W. P.) Ins. v. Newark Fire Ins. Co.....402, 403, 430
Hamilton v. Firemen's Fund Ins. Co.....234, 256
Hamilton Fire Ins. Co. v. Greger.....349, 469, 477, 479, 480, 481, 739
Hancock v. Hartford Fire Ins. Co..... 338
Hanson v. Hayman..... 796
Hanvey v. Georgia Life Ins. Co.....717, 718, 719
Hardenburgh v. Employers' Liability Assur. Corporation.....709, 710, 717
Harris v. American Casualty Co.....709, 710, 711, 717, 730
Harrison v. Phoenix Assurance Co..... 578
Harris v. P. Koenig Coal Co..... 952
Harris v. St. Paul Fire & Marine Ins. Co.....144, 147, 191, 325
Hart v. Springfield Fire & Marine Ins. Co.....450, 463
Hartford Fire Ins. Co. v. Bernard.....371, 640
Hartford Fire Ins. Co. v. Conway..... 531
Hartford Fire Ins. Co. v. Owens.....218, 226, 246, 275, 311, 382
Hartford Fire Ins. Co. v. Wimbish..... 587
Hartigan v. Casualty Co. of America.....27, 845, 883, 913
Harvey v. Pawtucket Mutual Fire Ins. Co.....212, 217, 218, 237, 294
Haas Tobacco Company v. American Fidelity Co.....822, 824
Hatton v. Indemnity Ins. Co. of North America..... 710
Haussler v. Indemnity Company of America..... 501
Hawkins v. Robertson..... 477
Hayes v. Automobile Ins. Exchange.....30, 89
Healy v. Stuyvesant Ins. Co.....229, 337
Hebojoff v. Globe Indemnity Co..... 786
Heck v. Henne..... 483
Hedwall (Charles J.) Co. v. Security Mortgage Co..... 337
Heller v. Standard Accident Ins. Co.....822, 837
Heller (Walter E.) & Co. v. International Indemnity Co..... 781
Henderson v. Crescent City Seltzer & M. Water Co..... 483
Henderson v. Northwestern Mutual Ins. Co..... 634
Henican v. Woodman..... 483
Hennessy v. Automobile Owners' Ins. Ass'n..... 21
Henning v. United States Ins. Co..... 3

[References are to sections.]

SECTION.

Hernance v. Globe Indemnity Co.....828, 863
Hessen v. Iowa Automobile Mutual Ins. Co.....18, 19, 24, 166, 249, 265, 394, 427, 563
Hessler v. North River Ins. Co.....59, 87, 88, 89, 278, 402, 409
Hexter v. Equitable Fire & Marine Ins. Co..... 360
Hi-Grade Oil & Gas Co. v. United States Fidelity & Guaranty Co..... 341
Hill v. British & Foreign Marine Ins. Co.....320, 321, 419
Hill-Howard Motor Co. v. International Indemnity Co..... 308
Hill v. International Indemnity Co.....295, 300
Hill v New Amsterdam Casualty Co..... 903
Hill v. North River Ins. Co..... 600
Hirsch v. City of New York Ins. Co.....18, 278, 282
Hoadley v. Purifoy..... 3
Hoagland Wagon Co. v. London Guaranty & Accident Co..... 786
Hoffman v. Prussian National Ins. Co.....332, 329
Holdaway v. British Crown Assurance Corporation..... 31
Hollings v. Brown..... 796
Home Ins. Co. v. Bennett.....29, 370
Home Ins. Co. v. Henderson..... 311
Home Ins. Co. v. New York..... 5
Home Ins. Co. v. Paul.....603, 604, 752
Home Ins. Co. v. Walter..... 451
Honey v. Pacific Automobile Indemnity Exchange..... 357
Hooper v. California.....2, 5
Hoosier Mutual Automobile Ins. Co. v. Lanam.....26, 717, 731
Hopkins v. American Fidelity Co..... 889
Hopkins v. Connecticut..... 3
Horan v. Altman..... 952
Horsey v. Ciaroro..... 955
Hossley v. Union Indemnity Co. of New York.....736, 770, 933
Hubbard v. Ohio Farmers' Ins. Co.....29, 217
Hughes v. Hartford Fire Ins. Co..... 151
Humphrey v. Polski.....800, 847
Hunter v. Royal Ins. Co..... 572
Huston v. State Ins. Co..... 678
Hutchings v. Southwestern Automobile Ins. Co. of Los Angeles.....759, 760
Hutchins v. United States Automobile Ins. Exchange..... 331
Hyer v. Inter-Insurance Exchange of Automobile Club of Southern California 26, 898

I.

Illinois Automobile Ins. Exchange v. Braun..... 477
Importers' & Exporters' Ins. Co. v. Jones.....26, 762
Indemnity Co. of America v. Cox..... 469
Indemnity Co. of America v. Mahaffey..... 51

[References are to sections.]

SECTION.

Indemnity Ins. Co. of North America v. Gardner....740, 745
Indemnity Co. of America v. Slade....623, 700
Independent Milk & Cream Co. v. Aetna Life Ins. Co.... 842
Ingersoll v. Union Automobile Ins. Co....341, 427
Inland Finance Co. v. Home Ins. Co....208, 215, 218, 308
Insurance Co. v. Barnes.... 59
Insurance Co. v. Booker.... 59
Insurance Co. v. Morse.... 5
Insurance Co. of North America v. Folds....440, 456
Insurance Co. v. Wilkinson.... 59
Intermountain Ass'n of Credit Men v. Milwaukee Mechanics Ins. Co.... 370
International Indemnity Co. v. Duncan....27, 217, 218, 219, 259
Interstate Automobile Ins. Co. v. Edens....208, 211
Interstate Casualty Co. v. Stewart....718, 719
Interstate Fire Insurance Co. v. Sorrells....28, 111, 112, 118, 220, 222, 231
Investors' Mortgage Co. v. Marine & Motors Ins. Co....23, 212, 215, 294, 297
Irwin v. Missouri Valley Bridge & Iron Co....970, 975

J.

Jaloff v. United Automibile Indemnity Exchange.... 27
James v. Phoenix Assurance Co....597, 604
Jarnagin v. Queen Ins. Co. of America....330, 349, 388, 580
Jeffords v. Tokio Marine & Fire Ins. Co.... 103
Johnson v. Glens Falls Ins. Co.... 762
Johnson v. Home Mutual Ins. Ass'n....31, 559
Johnson v. Royal Motor Car Ins. Ass'n....91, 102
Johnson v. United Firemen's Ins. Co.... 702
Johnson v. Yorkshire Ins. Co....32, 35, 36
Jones v. Automotive Ins. Co....429, 529
Jones v. Federal Automobile Ins. Ass'n.... 144
Jones v. International Indemnity Co....37, 108, 984
Jones v. Orient Ins. Co....386, 456
Jones v. Sunshemer.... 952
Journal Co. v. General Accident Fire & Life Assurance Corporation.... 522
Joy Floral Co. v. Norris.... 483

K.

Kansas City Regal Automobile Co. v. Old Colony Ins. Co....687, 688
Kansas Free Fair Ass'n v. Georgia Casualty Co....786, 792
Karelson v. Sun Fire Office.... 32
Kennelly v. London Guarantee & Accident Co....878, 879
Kenney v. Franklin Fire Ins. Co.... 76
Kerr v. Union Marine Ins. Co.... 37

[References are to sections.]

SECTION.

Kinneberg v. Firemen's Ins. Co. 245
Kliant v. Providence Assurance Co. 709
Knight v. Hartford Fire Ins. Co. 137
Koropchensky v. Goddard 362
Kruger v. California Highway Indemnity Exchange 806
Kunkle v. Union Casualty Co. 27

L.

Lackey v. Olds & Stoller Inter-Exchange 796, 922
Lancaster v. Amsterdam Improv. Co. 768
Landaker v. Anderson 779
Lang v. Eagle Fire Co. 440
Langley v. Zurich General Accident & Liability Ins. Co. 808
Larkin v. Glens Falls Ins. Co. 53
Law v. Northern Assurance Co. 37
Leaksville Light & Power Co. v. Georgia Casualty Co. 565
Lee v. Clark 792
Ledvinka v. Home Ins. Co. of New York 217, 231, 237, 239, 587, 589, 595, 686
Lepman v. Employers' Liability & Assurance Corporation 709, 740, 750
Levin v. New England Casualty Co. 905
Lewis v. Chapin 72
Lewis v. Commercial Casualty Ins. Co. 404, 830
Lidfords v. Pflaum 952
Lindreth v. National Fire Ins. Co. 216
Lindstrom v. Employers' Indemnity Corporation 53, 104, 130
Liverpool, London & Globe Ins. Co. v. Georgia Automobile & Supply Co. 26, 193
Livingston v. Dole 952
Lock v. Neel Co. 57, 66, 345
Locke v. Royal Ins. Co. 172
Locomobile Co. v. Nichols 503
London Assurance Co. v. Companhia De Moagens, do Barreiro 707, 709
London Guarantee & Accident Co. v. Sowards 722
London & Lancashire Indemnity Co. v. Cosgriff 783, 786, 788, 789, 832, 834
Lorando v. Gethro 779, 786, 807, 808
Lorenz v. Bull Dog Automobile Ins. Ass'n 177, 180, 185, 545, 552, 566
642, 959
Lord v. Lincoln Mutual Casualty Co. 629
Love v. National Liberty Ins. Co. 640
Lower Main Street Bank v. Caledonian Ins. Co. 688
Lozier Automobile Exchange v. Interstate Casualty Co. 69, 403, 618, 691
692, 752, 753, 756, 758
Lucas v. Mueller 800, 911
Ludwig v. Pacific Fire Ins. Co. 604, 684, 752

[References are to sections.]

SECTION.

Luger v. New Amsterdam Casualty Co. 789
Lummus v. Fireman's Fund Ins. Co. 130, 189
Lundberg v. Equitable Fire Marine Ins. Co. 161
Lunt v. Aetna Life Ins. Co. 779
Luttrell v. Hardin 952

M.

McAleenan v. Massachusetts Bonding & Ins. Co. 877
McClellan v. General Casualty & Surety Co. 38, 915
McClung v. Pennsylvania Taximeter Cab Co. 97
McGovern v. Oliver 952
McNamara v. Leipzig 952
Maceika v. Automobile Underwriters of America 118
MacLure v. General Accident Ins. Co. of Canada 933
Magee v. Vaughan 952
Mahler v. Hibernia Ins. Co. 413
Malachowski v. Varro 796, 800
Malmgren v. Southwestern Automobile Ins. Co. 807, 808
Maltby v. Empire Automobile Ins. Ass'n 337
Manley v. Montgomery Bus Co. 469
Mannheimer Bros. v. Kansas Casualty & Surety Co. 849, 855, 933, 935
Marks v. Home Fire & Marine Ins. Co. 198, 677
Markle v. American Automobile Ins. Co. 923
Marmon Chicago Co. v. Heath 205
Maroni v. Massachusetts Fire & Marine Ins. Co. 638, 644
Marple v. American Automobile Ins. Co. 807, 808
Martin v. Lilly 952
Maryland Casualty Co. v. Lamarre 863
Maryland Casualty Co. v. Jackson 505
Maryland Casualty Co. v. Peppard 786
Maryland v. L. R. Christenson Co. 3
Maryland Motor Car Ins. Co. v. Haggard 499
Maryland Motor Car Ins. Co. v. Newell Contracting Co. 306, 455
Massachusetts Bonding & Ins. Co. v. Texas Finance Corporation 752, 753
Mathews v. Bloomfield 800
Maxwell Gravel Co. v. Fisher 469, 738
Mayor, Lane & Co. v. Commercial Casualty Ins. Co. 201, 840, 879, 880
Mazeika v. Automobile Underwriters of America 118
Mechanics' Ins. Co. of Philadelphia v. Teat 348, 542, 576
Melcher v. Ocean Accident & Guarantee Corporation 822, 823
Merchants' & Employers' Guarantee & Accident Co. v. Prevost 376
Merchants' & Manufactures' Inter-Insurance Alliance v. Hansen 522, 524, 567
Merchants' Mutual Automobile Liability Ins. Co. v. Smart 6, 808, 844
Messersmith v. American Fidelity Co. 770, 921, 933

[References are to sections.]

SECTION.

Metcalf v. National Union Fire Ins. Co. 398
Metropolitan Casualty Ins. Co. v. Blue 807, 808, 864
Metropolitan Casualty Ins. Co. of New York v. Albritton 871, 942
Metropolitan Life Ins. Co. v. McNall 3
Meyer Diary Equipment Co. v. Connecticut Fire Ins. Co. 666
Meyer v. Iowa Mutual Liability Ins. Co. 832
Michigan Automobile Ins. Exchange v. Vaughan 970
Michigan Automobile Ins. Co. v. Van Buskirk 261
Michigan Commercial Ins. Co. v. Wills 587, 595
Midland Motor Co. v. Norwich Union Fire Ins. Co. 87, 89, 90, 401, 753
Millard v. Aetna Casualty & Surety Co. 821
Miller v. Commercial Union Assurance Co. 114, 116, 118, 131, 132
Miller v. Head 506, 701, 702
Miller v. Phoenix Assurance Co. 587, 595, 613, 793
Miller v. Union Indemnity Co. 544, 808, 829, 832, 844, 872
Milliron v. Dittman 796
Milwaukee Mechanics' Ins. Co. v. Weathered 519, 636, 752, 753
Mobbad v. Western Indemnity Co. 711, 712, 726
Molnar v. Central Mutual Automobile Ins. Co. of Detroit 668, 699
Monaco v. Queen Ins. Co. of America 139
Morris v. Firemen's Ins. Co. 21
Morris Plan Co. of Rhode Island v. Fireman's Fund Ins. Co. 624
Morrison v. Royal Indemnity Co. 847, 933, 936
Motor Union Ins. Co. v. Brogan 293
Mowles v. Boston Ins. Co. 18, 32, 35
Moy Quon v. Furuya Co. 952
Murphy v. Ins. Co. 59
Mutual Automobile Ins. Co. v. Bernal 800, 828
Mutual Life Ins. Co. v. Boyle 3
Myers v. Maryland Casualty Co. 87, 88

N.

National Fire Ins. Co. v. Elliott 26, 763
National Fire Ins. Co. v. Gellman 74, 273, 402, 431, 513
National Liberty Ins. Co. of America v. Milligan 32
National Mutual Ins. Co. v. Bales 90, 110, 256, 412, 641
National Union Fire Ins. Co. v. Avant 27, 310
National Union Fire Ins. Co. v. Crabtree 57, 402, 408
National Union Fire Ins. Co. v. Wanberg 4
Neal, Clark & Neal Co. v. Liverpool, London & Globe Ins. Co. 755
Neff v. Fidelity & Casualty Co. 792
Nelson v. National Automobile Ins. Co. 597, 611
Neuberger v. Preferred Accident Ins. Co. 905
New Brunswick Fire Ins. Co. v. Morris Plan Bank 208, 210, 295, 300, 304, 308

[References are to sections.]

SECTION.

New Jersey Ins. Co. v. Young....26, 710, 712, 713
Newtown Creek Towing Co. v. Aetna Ins. Co....707, 709
New York Consolidated R. R. Co. v. Massachusetts Bonding & Ins. Co... 864
New York Indemnity Co. v. Ewen....796, 817
New York Indemnity Co. v. Hatcher.... 737
New York Life Ins. Co. v. Cravens.... 5
New York & P. R. S. S. Co. v. Aetna Ins. Co.... 25
Norris v. Alliance Ins. Co.... 249
Norris v. West.... 952
North British & Mercantile Ins. Co. v. San Francisco Securities Corporation 144
North River Ins. Co. v. Adams.... 453
North River Ins. Co. v. Atkinson....145, 176, 276, 278
North River Ins. of New York v. Lewis.... 93
Northern Assurance Co. v. Pate.... 404
Northrup v. Mississippi Valley Ins. Co.... 3
Northwestern National Ins. Co. v. Chambers....29, 156, 157, 526, 552, 556
Northwestern National Ins. Co. v. Cohen....391, 392, 648
Nutting v. Massachusetts.... 5

O.

O'Connell v. New York Fidelity & Plate Glass Ins. Co....808, 933, 935
O'Connell v. New York N. H. & H. R. R.... 786
O'Conner v. Maryland Motor Car Ins. Co....402, 643, 645
O'Connor v. Hartford Accident & Indemnity Co.... 807
O'Hearn v. Yorkshire Ins. Co.... 773
O'Leary v. St. Paul Fire & Marine Ins. Co....709, 732, 734
O'Neal v. Pocahontas Transportation Co.... 796
O'Neill v. Queen Ins. Co. of America....18, 32, 33, 39, 49
Oakland Motor Car Co. v. American Fidelity Co....822, 827, 834
Offutt v. National Fire Ins. Co....144, 373, 440, 449
Ohio Farmers' Ins. Co. v. Todino.... 21
Old Colony Ins. Co. v. Kolmer.... 631
Olson v. Western Automobile Ins. Co.... 964
Orient Ins. Co. v. Daggs.... 2
Orient Ins. Co. v. Van Zandt-Bruce Drug Co....118, 202, 203, 411
Orr v. Farmers Automobile Ins. Ass'n....709, 724
Osmond Barringer Co. v. Standard Fire Ins. Co.... 233
Ouimet v. National Ben Franklin Fire Ins. Co.... 632
Overland-Reno Co. v. International Indemnity Co....597, 600, 601
Overland Sales Co. v. American Ind. Co....76, 827
Owens v. Jackson-Hinton Gin Co.... 786

[References are to sections.]

P.

	SECTION.
Pacific States Fire Ins. Co. v. C. Rowan Motor Co.	237, 425
Page v. National Automobile Ins. Co. of Lincoln	17, 31, 316
Palmer v. Bull Dog Automobile Ins. Ass'n	257, 964
Palmetto Fire Ins. Co. v. Beha	12
Palmetto Fire Ins. Co. v. Connecticut	12
Park v. Schell	952
Pasewalk v. Bollman	792
Patterson v. Adan	779, 796
Patterson v. Standard Accident Ins. Co.	26, 839
Paul v. Virginia	1, 2
Paulauskas v. Fireman's Fund Ins. Co.	404, 415
Pelican v. Mutual Life Ins. Co.	117
Pennsylvania Fire Ins. Co. v. Johnson	38, 41, 292, 305, 641, 752, 753, 757
People ex rel. Hartford Life & Annuity Ins. Co. v. Fairman	5
People v. Loew	3
People v. Payn	3
People v. Philadelphia Casualty Co.	786
People v. Seddon Underwriting Co. and Seddon	5
Perrone v. National Union Fire Ins. Co.	336
Petrullo v. Mechanics' Ins. Co.	502
Pezel v. Yerex	805
Pezenik v. Greenberg	363
Pfaffengut v. Export Ins. Co. of New York	209, 216
Phillips v. Continental Automobile Ins. Ass'n	89
Phoenix Assurance Co. v. Eppstein	587, 595
Phoenix Assurance Co. v. Wimblish	585
Phoenix Ins. Co. v. American Trust & Savings Bank	27, 331, 343
Pickering v. Alyea-Nichols Co.	970
Piechuck v. Magusiak	952
Pigg v. International Indemnity Co.	53, 897, 808
Piper v. Dennis	752, 753, 754
Pisciotte v. Indemnity Co. of America	655
Platt v. Richmond R. Co.	469
Platzer v. Cutting Larson Co.	59
Ploe v. International Indemnity Co.	711, 714
Pope v. Red Cab Mutual Casualty Co.	960
Posnick v. Stedman	536
Potomac Ins. Co. v. Nickson	469, 492
Power Motor Co. (T. G.) v. United States Fire Ins. Co.	711, 718
Powers v. Wilson	795, 796, 799, 884
Pred v. Employers' Indemnity Corporation	718
Preston v. Aetna Ins. Co.	26, 569
Price v. Royal Ins. Co. of Liverpool	587, 620

[References are to sections.]

SECTION.

Primrose v. Casualty Co. of America 27, 803
Pritz v. Carnot 952
Puro v. Franklin Fire Ins. Co. 131

Q.

Quinlan v. Providence Washington Ins. Co. 87

R.

Rabinowitz v. Vulcan Ins. Co. 167
Rapaport v. American Central Ins. Co. 587, 594, 612
Raymond v. Automobile Owners' Ins. Co. 552
Record v. Royal Ins. Co. 118, 199, 202
Reed v. St. Paul Fire & Marine Ins. Co. 144, 148
Reese v. Standard Automobile Ins. Ass'n 218, 540, 539
Reeves v. Fire Ins. Co. 399
Reilly v. Linden 795
Reiter v. Northwestern International Ins. Co. 660, 670
Reliance Motor Co. v. St. Paul Fire & Marine Ins. Co. 552, 556
Riding v. Travelers Ins. Co. 808, 897
Riner v. Southwestern Surety Ins. Co. 786
Rivara v. Ins. Co. 59
Robinson v. Union Automobile Ins. Co. 552, 555
Roby v. American Central Ins. Co. 87
Rockmaker v. Motor Union Ins. Co. 237, 247, 573
Rohlf v. Great American Mutual Indemnity Co. 863
Rohrback v. Travelers' Indemnity Co. 374, 375
Rosenberg v. Maryland Casualty Co. 400, 402, 407, 521, 879
Rosin v. National Fire Ins. Co. 401
Ross v. Law Union & Rock Ins. Co. 609
Ross v. Michigan Mutual Automobile Ins. Co. 735
Ross v. Williamette Valley Transfer Co. 952
Rosummy v. Marks 952
Roth v. National Automobile Mutual Casualty Co. 805, 863, 808
Rott v. Westchester Fire Ins. Co. 440, 468
Rouse v. St. Paul Fire & Marine Ins. Co. 717, 718, 719
Royal Hawaiian Sales Co. v. Home Ins. Co. of Hawaii 710, 711, 715
Royal Indemnity Co. v. May & Bell 895
Royal Indemnity Co. v. Schwartz 779, 881, 933, 934
Royal Ins. Co. v. Eggleston 108, 113, 216
Royal Ins. Co. v. Jack 585, 601, 752

S.

St. Louis Screw Co. v. Mastin 792, 884
St. Paul Fire & Marine Ins. Co. v. American Compound Co. 708, 711, 712, 718, 719

[References are to sections.]

SECTION.

St. Paul Fire & Marine Ins. Co. v. Huff 134, 313
St. Paul Fire & Marine Ins. Co. v. McCoy 18
Saglineni v. Merrimack Mutual Fire Ins. Co. 144
Sahquist v. Oregon Fire Relief Ass'n 32
Sare v. United States Fidelity & Guaranty Co. 453
Savarese v. Hartford Fire Ins. Co. 249
Sawyer v. National Fire Ins. Co. 144, 309, 402, 405, 416, 646
Schambs v. Fidelity & Cas. Co. 786
Schenectady Varnish Co. v. Automobile Ins. Co. 28, 552, 558, 587, 590, 683
Schloss v. Importers' & Exporters' Ins. Co. 217, 242
Schmid v. Heath 604, 618, 752
Schmidt v. Schalm 952
Schoenfeld v. New Jersey Fidelity & Plate Glass Ins. Co. 800, 805, 808. 863
871. 928
Schussler v. Ft. Dearborn Casualty Underwriters 718, 721
Schwartz v. H. H. Mondon, Inc. 669
Schwier v. Atlas Assurance Co. 440, 448
Scott v. Bankers' Automobile Ins. Ass'n 135
Scottish Union, etc. Ins. Co. v. Warren Gee Lumber Co. 53
Scranton Gas & Water Co. v. Weston 952
Searle v. Alliance Ins. Co. of Philadelphia 436, 441
Seattle Dodge Service Co. v. Royal Ins. Co. 752, 753
Seattle & S. F. R. R. & Nav. Co. v. Maryland Casualty Co. 792
Security Ins. Co. v. McAlister 378, 402, 403, 418, 637
Security Ins. Co. v. Seller-Sammons-Signor Motor Co. 27, 28, 597, 601, 604
689, 690. 752
Serri v. National Surety Co. 32
Serbinoff v. Wolverine Mutual Motor Ins. Co. 29, 101, 380
Seitovitz v. United States Fire Ins. Co. of City of New York 765
Shapiro v. Security Ins. Co. 71, 87, 126, 136, 394, 400, 402, 404, 407, 423
Shea v. United States Fidelity & Guaranty Co. 786, 787, 807
Shepard v. Pocahontas Transportation Co. 796
Sheridan v. Massachusetts Fire & Marine Ins. Co. 32, 76, 80
Siegel v. Union Assurance Soc. of London 604
Silverman v. American Eagle Fire Ins. Co. 146
Simon v. Mechanics' Ins. Co. 90, 251, 511
Simpionbato v. Royal Ins. Co. 218, 346, 649
Sininerope v. Hartford Fire Ins. Co. 393, 394, 408
Snell v. North British & Mercantile Ins. Co. 403
Solomon v. Federal Ins. Co. 3, 60, 61, 76, 94, 99, 118, 112, 130, 142, 144, 323
South v. Philadelphia Fire & Marine Ins. Co. 216
Southern Casualty Co. v. Johnston 26, 708, 719
Southern Casualty Co. v. Landry 392, 597, 605, 525, 759
Southern Casualty Co. v. Welch Motor Co. 202
Spivy-Johnson Portrait Co. v. Belt Automobile Indemnity Ass'n 86, 253
348, 359. 575

[References are to sections.]

SECTION.

Springfield Fire & Marine Ins. Co. v. Booher....402, 403
Springfield Fire & Marine Ins. Co. v. Chandlee....217, 218, 224, 232, 237
Springfield Fire & Marine Ins. Co. v. Donahoe.... 403
Springfield Fire & Marine Ins. Co. v. Winn.... 413
Stacey v. Fidelity & Casualty Co. of New York....53, 779, 781, 782, 807, 828
Stallani v. Belt Automobile Indemnity Ass'n.... 38
Standard Accident Ins. Co. of Detroit v. Richmond....352, 381, 748
Standard Automobile Assurance Ass'n v. West....119, 136, 144, 353
Standard Automobile Ins. Ass'n v. Henson....57, 541, 970
Standard Automobile Ins. Ass'n v. Neal....27, 30, 116, 118, 286, 287, 771
Standard Automobile Ins. Ass'n v. Reese.... 349
Standard Automobile Ins. Ass'n v. Russell....60, 144, 970
Stanford v. Noble.... 952
Stanilov v. Lincoln Mutual Casualty Co....59, 391
Stanley v. Belt Automobile Indemnity Ass'n....118, 133, 158, 173, 968
Stanton v. Aetna Accident & Liability Co.... 963
State v. Fidelity & Casualty Co. of New York....517, 518
State v. New Jersey Indemnity Co.... 971
State v. Spaulding.... 12
State v. Stone.... 5
State ex rel. American Automobile Ins. Co. v. Schramm....14, 15
State ex rel. Western Automobile Ins. Co. v. Trimble.... 792
Staten v. General Exchange Ins. Corporation of New York.... 687
Steinbach v. Maryland Casualty Co.... 807
Steinfield v. Massachusetts Bonding & Ins. Co....368, 920
Stenbom v. Brown Corliss Engine Co.... 792
Sterios v. Southern Surety Co.... 946
Stevens v. Stewart Speedometer Corporation....453, 469, 472
Stewart v. Haliburton & Freeman.... 359
Stewart v. Home Fire Marine Ins. Co. of California....587, 752, 605
Stoddard v. National Liberty Ins. Co. of America.... 217
Stone v. American Mutual Automobile Ins. Co....402, 403, 469, 471, 606, 619
Stovall v. New York Indemnity Co....27, 928, 929
Stower (G. A.) Furniture Co. v. American Indemnity Co....875, 892
Stix v. Travelers' Indemnity Co....264, 731, 925, 945
Strombald v. Hanover Fire Ins. Co....303, 512
Stuht et ux. v. Maryland Motor Car Ins. Co....593, 717, 726, 729
Stusser v. Mutual Union Ins. Co....796, 798, 802
Stuyvesant Ins. Co. v. A. C. Smith Sales Co.... 31
Suetterlein v. Northern Ins. Co....160, 208, 216, 244
Sullivan v. Hartford Fire Ins. Co.... 413
Sun Ins. Office v. Hohenstein.... 478
Sunderlin on Fire Insurance....17, 82, 291, 295, 315, 319, 325, 337, 410, 411, 413, 482, 500

Sutherland v. Hawaiian Ins. & Guaranty Co.... 711
Syracuse v. Standard Accident Ins. Co.... 805

[References are to sections.]

SECTION.

Skoug v. Hartford Accident & Indemnity Co.....618, 752, 753
Slomovitz v. Union Ins. Co. of Canton.....607, 688
Small v. Morrison.....796, 800, 818
Smith v. American Automobile Ins. Co.....76, 78, 144, 150
Smith v. Globe & Rutgers Fire Ins. Co..... 694
Smith v. Hartford Fire Ins. Co..... 109
Smith v. Massachusetts Bonding & Ins. Co..... 32
Smith v. National Union Fire Ins. Co.....502, 534, 696
Smith v. United Warehouse Co.....488, 694
Smith Stage Co. v. Eckert..... 800
Snavely v. London Assurance Corporation.....60, 331, 337, 338

T.

Taxicab Motor Co. v. Pacific Coast Casualty Co.....32, 550, 774, 848 863
Teters v. Gass..... 786
Texas Short Line R. Co. v. Waymire..... 786
Thacher v. Aetna Accident & Liability Co..... 890
Third National Bank v. Yorkshire Ins. Co.....89, 944
Thompson v. National Fire Ins. Co.....23, 294, 397, 422
Tincknell v. Ketchman..... 952
Tinker v. Boston Ins. Co. of America.....718, 723
Tinline v. White Cross Ins. Ass'n.....772, 921, 933
Titus v. Glens Falls Ins. Co.....87, 88
Tohlf v. Great American Mutual Indemnity Co..... 863
Tokio Marine & Fire Ins. Co. Ltd. v. Parnes Ins. Co..... 489
Tomato Products Co. v. Manufacturers' Liability Ins. Co.....176, 566
Transylvania Casualty Ins. Co. v. Williams.....747, 761, 780, 783, 790, 796
Travelers' Indemnity Co. v. Mahaney..... 387
Travelers' Ins. Co. v. Mosses..... 786
Travelers' Ins. Co. v. Plaster..... 393
Trenton Pass Ry. Co. v. Guarantor's Liability Indemnity Co..... 767
Troy Automobile Exchange v. Home Ins. Co.....283, 516
Tunnel Co. v. General Accident Fire & Life Ins. Co..... 786
Turner v. Henshaw.....975, 976, 977

U.

Underwood Veneer Co. v. London Guarantee & Accident Co..... 821
Underwriters at Lloyds Ins. Co. v. Vicksburg Traction Co..... 485
Underwriters' Exchange v. Indianapolis Street Ry. Co.....970, 979
Union Assurance Soc. Ltd. of London v. Renner..... 218
Union Automobile Ins. Co. v. Samelson..... 930
Union Indemnity Co. v. Hossley.....736, 933
Union Ins. Soc. of Canton v. De Salvo.....38, 40

[References are to sections.]

SECTION.

Union Ins. Soc. of Canton v. Sudduth....22, 527
Union Marine Ins. Co. v. Charlie's Transfer Co.... 456
Union Marine Ins. Co. v. High.... 570
United Automobile Ins. Ass'n v. Henderson....241, 278
United States Casualty Co. v. Anderson Electric Car Co....957, 958
United States Casualty Co. v. Breese.... 828
United States Casualty Co. v. Drew....863, 865
United States Fidelity & Guaranty Co. v. Carmichael.... 821
United States Fidelity & Guaranty Co. v. Corbett....328, 437, 456, 457
United States Fidelity & Guaranty Co. v. O'Keefe.... 493
United States Fidelity & Guaranty Co. v. Williams....780, 789, 808, 844
United States Lloyds Inc. v. Savannah Marmon Agency.... 420
Universal Service Co. v. American Ins. Co. of Newark....732, 719
Utica Mutual Ins. Co. v. Glennnie.... 908
Utterback-Gleason Co. v. Spencer.... 12
Utterback-Gleason Co. v. Standard Accident Ins. Co. of Detroit....27, 866, 888

V.

Valley Mercantile Co. v. St. Paul Fire & Marine Ins. Co.,....586, 587, 593
Van Vechten v. American Eagle Fire Ins. Co....585, 587, 597, 604, 696
699, 702
Vaught v. Home Ins. Co. of New York....187, 552, 566
Vigliotti v. Home Ins. Co....22, 633
Vogel and Vogel v. Indemnity Co.... 250
Vollmer v. Automobile Fire Ins. Co....277, 278

W.

Wagoner v. Fidelity & Casualty Co.... 934
Waitsmen v. Northwestern National Ins. Co.... 31
Walker v. Fireman's Fund Ins. Co.47, 59, 117, 118, 119, 121, 192, 229, 522, 530
Wallus v. Ins. Co. of North America.... 216
Walsh v. Hartford Fire Ins. Co.... 87
Walton v. American Central Ins. Co.... 403
Ward v. Alliance Ins. Co.... 655
Water v. Western Automobile Ins. Co.... 964,..966
Water-Pierce Oil Co. v. Texas.... 2
Waters v. Schultz.... 483
Weatherwax v. Royal Ins. Co....406, 417, 800
Webber v. Fidelity Lloyds of America....402, 404, 641, 667
Weed v. Cumming.... 3
Week v. Federal Automobile Ins. Ass'n....32, 35
Wehrahan v. Dearborn Casualty Underwriters of Chicago....779, 780
Weir v. Central National Fire Ins. Co....593, 595, 608

[References are to sections.]

SECTION.

Weison v. Automobile Ins. Co. of Hartford....621, 622, 688
Weiss v. Millers' National Ins. Co.... 176
Weiss v. New Jersey Fidelity & Plate Glass Ins. Co....779, 815, 827, 834
Weiss v. Security Ins. Co. of California....176, 217, 230
Welch v. British American Assurance Co.... 28
Wells v. Morrison.... 952
Western Indemnity Co. v. Walker-Smith Co....856, 858, 861
Wetherill v. Williamsburgh City Fire Ins. Co.... 733
Wettengel v. United States Lloyd's.... 708
Wheaton v. Ins. Co.... 59
Wheeler v. Globe & Rutgers Fire Ins. Co....762, 950
Wheeler v. London Guarantee & Accident Co. of London.... 907
White v. Home Mutual Ins. Ass'n....119, 133, 176, 181, 194, 313, 522
Whitcomb v. Automobile Ins. Co. of Hartford....175, 184, 383, 384, 636, 642
Whitney v. Employers' Indemnity Corporation....509, 800, 917, 929, 941
Wieson v. Automobile Ins. Co....428, 433
Wilensky v. Georgia Casualty Co.... 814
William Penn Motor Indemnity Exchange v. Haddad.... 970
Williams v. Hamilton Fire Ins. Co....438, 454, 456, 466
Williams v. Nelson....808, 897, 937
Wilson Bryant Co. Inc. v. Agricultural Ins. Co. of Watertown.... 747
Wilson v. Scottish Ins. Coporation.... 900
Wilson v. Smith.... 792
Witherstine v. Employers' Liability Assurance Corporation of London.... 910
Witt v. Continental Casualty Co....27, 935
Wolff Hartford Fire Ins. Co....742, 746
Wood v. American Automobile Ins. Co....202, 270
Wood v. Southern Casualty Co....708, 718, 722
Wright v. Aetna Life Ins. Co.... 41
Wright v. Brown.... 707

Y.

Yates v. Russell.... 694
Young v. New Jersey Ins. Co....712, 713
Yorkshire Ins. Co. v. Bunch-Morrow Motor Co....520, 743, 744
Yorkshire Ins. Co. v. Craine.... 361

Z.

Zabarsky v. Imployers' Fire Ins. Co....218, 271
Zachwik v. Hanover Fire Ins. Co....325, 326, 390
Zap v. United Casualty Co.... 552

INDEX.

[References are to sections.]

A.

ABANDONMENT. SECTION
recovery of automobile 645
theft insurance 596

ACCEPTANCE.
construction of policy 44
contract of agent 45

ACCEPTING STATEMENT AND ADMITTING LIABILITY.
waiver and estoppel 401
notice and proof of loss 401

ACCESSORIES.
cost 135
representations and warranties as to 135

ACCIDENT.
approximate cause 712
breaking an axle 713
caused by automobile 903
striking a stump 714
striking a tree 715
definition 894

ACTION.
See Right of Action.

ACTUAL COST OF REPAIRING OR REPLACING PARTS DAMAGED OR DESTROYED
construed 740

ACTUAL COST TO ASSURED INCLUDING EQUIPMENT.
construed 353

ADDITIONAL INSURANCE.
evidence of 532
intention to take out 92
warranty as to other insurance 211

[References are to sections.]

ADJUSTER. SECTION.

agency 69, 407
agent of insurer 366
apparent authority 71
authority limited by policy 70
authority of 365, 956
elects to repair 367
evidence 74
illustrations 71
ratification by 73
special instructions as to 72
waiver of warranty as to
encumbrance 253
locking device 665
title 253

ADMISSION.

evidence 523

ADMISSION OF FOREIGN COMPANIES.

see state regulation 5

AGE LIMIT.

see liability insurance 932, 938

AGE OF DRIVER.

collision insurance 736

AGENCY.

agent defined 56
agent represents insurer 57
agent may act for insured 64
appointment 58
authority of agent 59, 87
dealer as agent 62
acting without scope of his employment 63
dual capacity of agent 506
evidence of 421
notice and proof of loss 421
examination of car by insurer's agent 182
as affecting representations or warranties 182
jury 67
local agent with limited authority 61
premium 109
representation as to model of car 158
right of action 65
soliciting agent 60

[References are to sections.]

AGENCY.—(Continued.) SECTION.
statute 68
termination of agency 66
title and ownership 274
waiver and estoppel 399
notice and proof of loss 405, 409
See Adjuster; Procedure; Reformation.

ANSWER.
See Procedure.

ANTECEDENT SETTLEMENT.
subrogation 482
See Settlement.

APPEAL AND ERROR.
assignment 52
fire insurance 582
representation as to model of car 175
theft insurance 642

APPEAL BOND.
answer 949

APPLICATION.
construction 31
failure to act on 316
for minor's license 922
theft insurance 671
waiver and estoppel 86

APPRAISAL, ARBITRATION AND AWARD.
agreement to arbitrate, definition 435
appraisal and arbitration distinguished 436
award, validity 456
written submission 457
condition precedent 440
disagreement necessary 441
evidence
impeachment 466
fraud 442
in general 434
instruction
taking oath 467
jury, waiver 468
law or equity 464

[References are to sections.]

APPRAISAL, ARBITRATION AND AWARD.—(Continued.) SECTION.
liability ... 437
statute ... 438
non-waiver agreement ... 454
notice ... 451
oral agreement ... 455
pleading and practice, measure of liability ... 465
rate book ... 458
revocable ... 443
right to sue ... 452
salvage ... 459
stipulation reasonable and valid ... 439
substitution of umpire ... 460
swearing ... 461
technicalities ... 453
total loss ... 463
waiver ... 444
failure to accept insurer's estimate ... 450
illustration ... 445
in general ... 444
offer of settlement ... 447
after suit ... 448
refusal to arbitrate ... 446
subsequent agreement ... 449

APPRECIATION IN VALUE.
liability insurance ... 900

ARBITRATION.
See Appraisal, Arbitration and Award.

ARSON.
See Fire Insurance.

ASSESSMENTS.
mutual association ... 967

ASSIGNMENT.
appeal and error ... 52
procedure ... 507
oral contract ... 508
right of action ... 51
rights of assignee ... 358
subrogation ... 474
waiver ... 50

ASSOCIATION.
rules of mutual ... 965

[References are to sections.]

ASSURED.
See Insured.

ATTORNEY FEES. SECTION.
insurer liable for, refusal to defend 858
Kansas statute allows 968
liability insurance 943
mutual associations 968
procedure 503

AUTHORITY.
limitation of, reciprocals 972
of agents 87
See Agency; Representations and Warranties; Title and Ownership; Waiver and Estoppel.

AUTHORITY OF AGENT.
See Agency.

AUTOMOBILE INSURANCE.
state regulation 6

AWARD.
See Appraisal, Arbitration and Award.

B.

BAILEE.
insurer's right of action against 492
theft by 604, 623, 684

BANKRUPTCY.
See Insolvency.

BILL OF SALE.
delivery 245

BODILY INJURIES.
claims on account of 897

BOND AND POUNDAGE FEES.
as costs 857

BORROWED MONEY.
paying judgment with 794

BORROWER.
theft insurance 611

[References are to sections.]

BROKERAGE. SECTION.
application made to broker ... 78
assured liable for conduct of broker ... 79
binder ... 77
broker as agent of insurer ... 81
for collection of premium ... 82
broker defined ... 75
in general ... 76
illustrations ... 77
jury ... 83
oral agreement ... 80
reformation ... 562

BUMPERS.
promissory warranty ... 737

BURDEN OF PROOF.
collision insurance ... 749
fire insurance ... 579
liability insurance
age limit ... 938
liability for failure to perfect appeal ... 851
notice of accident or claim—waiver ... 832
optional contract ... 853
notice and proof of loss ... 427
procedure ... 538
reformation ... 563
theft insurance
automobile dealer's open policy ... 690
locking device ... 668
measure of recovery ... 637
procedure ... 702

C.

CANCELLATION.
evidence ... 536
illustration ... 333
in general ... 331
jury ... 346
evidence ... 346
local agent ... 336
mortgagee ... 343
notice, cancellation not effective without notice ... 332
notice must be received ... 334
oversight ... 342
repayment of unearned premium ... 337
waiver ... 338

[References are to sections.]

CANCELLATION.—(Continued.) SECTION.
surrender of policy 339
termination of policy by mutual consent 341
vendor in possession 340
waiver, property outside of state 344
when period begins to run 335
wrongful cancellation, no right of action against agent 345
See Waiver and Estoppel; Representations and Warranties; Title and Ownership.

CAR OPERATED WITH CONSENT OF OWNER.
policy inuring to benefit of injured claimant 801

CARRYING PASSENGERS FOR HIRE.
See Theft Insurance.

CARETAKER.
theft insurance 680

CERTIFICATE
as evidence of ownership 282

CHANGE OF INTEREST.
in purchase notes 310
liability insurance 917
title and ownership 232

CHANGE OF INTEREST, TITLE OR POSSESSION.
definition 232
See Title and Ownership.

CHANGE OF MOTOR.
liability insurance 909

CHANGE OF OWNERSHIP.
See Title and Ownership.

CHATTEL MORTGAGE.
creditor 288
title and ownership 264
void 223

CHAUFFEUR.
intent to steal 594
unlicensed 287
when insurer not liable for 912

[References are to sections.]

CLAIMS ON ACCOUNT OF BODILY INJURIES. SECTION.
liability insurance 897

CLAUSE FOR PAYMENT AFTER TRIAL AND JUDGMENT.
construed 882

COLLAPSE OF BUILDING.
collision 734

COLLISION INSURANCE.
age of driver 736
approximate cause 712
breaking an axle 713
striking a stump 714
striking a tree 715
bumpers 737
promissory warranty 737
burden of proof 749
collapse of building 734
contact with
bridge 730
curbing 725
ditch 720
embankment 718
ledge 721
rut 722
shoulder of pavement 724
washout 723
definition 706
driving in violation of law 735
evidence 743
accidental 743
amount of damages 745
jury 745
dismissal 747
expert testimony 744
"suitable repair and replace" 748
fall of scoop upon truck 732
falling down elevator shaft 733
illustrations 713
instruction 750
erroneous 750
impact with ground 710
in general 704
loss sustained 751
payment of judgment 751

[References are to sections.]

COLLISION INSURANCE.—(Continued.) SECTION.
maritime insurance 707
measure of damages 739
"actual cost of repairing or replacing parts damaged or destroyed", ... 740
conditional vendor 741
contract of indemnity 739
value of property 742
negligence of third party 738
roadbed 716
exclusion clause 717
rule of ejusdem generis 708
exception 708
skidding 731
upsets 726
car settling in soft ground 728
quick application of brakes 727
short turn while driving rapidly 729
use and coverage 705
washout 723
water and land 711
what it imports 709

COMMON LAW.
when applies in theft insurance 598

COMPENSATION.
use of insured car 196

COMPLAINT.
See Procedure.

COMPULSORY MOTOR VEHICLE ACT.
See State Regulation.

CONDITIONAL PURCHASER.
theft insurance 633

CONDITIONAL SALES.
conditional vendee 618
conversion or embezzlement insurance 754
measure of recovery 633
fraudulent trick, scheme, or device 605
insurable interest 22
knowledge 251
other insurance 213
buyer's interest voided 214

[References are to sections.]

CONDITIONAL SALES.—(Continued.) SECTION.
knowledge 213
master policy 213
parties 510
unconditional and sole owner 238
conditional sale purchaser 238
dealer's agent 241
lease 242
theft insurance 239
when agreed to by insurer 240
waiver 251
See Title and Ownership.

CONDITIONAL VENDEE.
theft insurance 618

CONDITION PRECEDENT.
liability insurance 821
notice and proof of loss 394

CONDITION SUBSEQUENT.
pleading 206
See Representations and Warranties; Title and Ownership; Waiver and Estoppel.

CONDUCT.
representations and warranties 163

CONDUCT OF AGENTS.
notice and proof of loss 402, 404
waiver and estoppel 402, 404

CONFLICT.
in evidence 279
See Evidence.

CONSENT OF OWNER.
car operated with 801

CONSTRUCTION OF THE POLICY.
acceptance 44
contract of agent 45
antedated transfer 42
application 31
assignment 49
appeal and error 52
right of action 51
waiver 50

[References are to sections.]

CONSTRUCTION OF THE POLICY.—(Continued.) SECTION.
binding slips 37
correspondence 46
divisible contract 47
failure to read policy 29
waiver 30
for account of whom it may concern 48
locking device warranty 653
oral contracts 32
consideration 33
proof 35
question of fact 34
parol evidence 36
renewal policy 43
representations and warranties 118
rider 38
contradiction of policy 39
miscellaneous 41
recovery for collision damage 40
rules of construction 25
forfeitures 28
inconsistent provisions 27
in general 25
intention of parties 26
statutes 53
statute of frauds 54
what law governs 55

CONTACT.
See Collision Insurance.

CONTRACT.
divisible 47
new contractual relationship 355
of indemnity 739
See Construction of the Policy.

CONTRACT ONE OF INSURANCE.
reciprocals 971

CONTRARY TO LAW.
insured car driven 286

CONTRIBUTORY NEGLIGENCE.
refusal of assured to defend on ground of 867

[References are to sections.]

CONVENTIONAL SUBROGATION. SECTION.
proof of ... 493
See Subrogation.

CONVERSION.
by insurer ... 575
See Conversion or Embezzlement Insurance.

CONVERSION OR EMBEZZLEMENT INSURANCE.
conditional purchaser ... 754
default in payment ... 758
notice ... 758
in general ... 752
joinder ... 756
liability of seller for ... 491
proof of loss ... 759
waiver, denial on other grounds ... 759
registration ... 760
theft insurance ... 610
measure of recovery ... 626
valid ... 753
vendor and vendee ... 755
"as their interests may appear", ... 755

COOPERATION.
recovery of automobile ... 647
See Liability Insurance.

CORRECT NUMBER AND TYPE OF CAR.
model ... 154

CORRESPONDENCE.
construction of the policy ... 46

COST.
description ... 131
See Representations and Warranties.

COST OF FINANCING.
representations and warranties ... 139

COSTS.
bond and poundage fees ... 857
insurer liable for ... 855
right of injured claimant to recover ... 819

[References are to sections.]

CREDITOR. SECTION.
insolvent judgment 961

CREDITOR'S BILL.
reciprocals 977

CRIMINAL NEGLIGENCE.
liability for 772
where negligent conduct constituted criminal offense 773

CRIMINAL MISCONDUCT.
See Fire Insurance.

CRIMINAL SUITS.
not included in liability policy 839

D.

DEALER.
acting without scope of his authority 63
as agent 62
conduct as affecting title warranties 241
fire policies 571
covered until delivered to purchaser 572
reporting risks "as known" 571

DECEIVE.
no intention to 160
intention to 199

DEDUCTIBLE CLAUSE.
insurer's liability 364
liability insurance 925

DEFAULT IN PAYMENT.
conversion or embezzlement insurance 758

DEFEND.
no provision that insurer shall 886

DEFENSE.
liability insurance 815
locking device warranty 662
mutual associations 969
not pleaded 519
representations and warranties 124
right to repudiate liability 816

[References are to sections.]

DEFENSE.—(Continued.) SECTION.
theft insurance 699
exchange of cars 701
gross negligence 700
policy condition 699

DELAY.
unreasonable 356

DELIBERATE ACT.
instructions 540

DENIAL OF LIABILITY ON OTHER GROUNDS.
notice and proof of loss 400

DEPRECIATING RATE SCHEDULE.
theft insurance 629

DEPRECIATION.
See Valued Policies.

DERAILMENT.
See Transportation Insurance.

DESCRIPTION.
erroneous 190
incorrect 172
matter of 177
See Representations and Warranties.

DETACHMENT.
of mortgage clause 309

DILIGENCE.
liability insurance 823

DIMINUTION OF VALUE.
theft insurance 627

DIRECTED VERDICT.
evidence 537

DISCREPANCY IN STATEMENT.
error 870
mistake 869
of assured 868

DRIVING IN VIOLATION OF LAW.
collision insurance 735

[References are to sections.]

DURATION OF RISK. SECTION.
risks and causes of losses 283

DURESS.
instructions 539
liability insurance 905
settlement 885

DUTY OF INSURED.
theft insurance 672

E.

EJUSDEM GENERIS.
exception to rule of 708

ELECTION.
to defend 841

ELEVATOR.
See Transportation Insurance.

EMBEZZLEMENT.
See Conversion or Embezzlement Insurance.

EMBEZZLEMENT RIDER.
mortgagee interests 308

EMPLOYEE.
theft insurance 613, 622, 681

ENCUMBRANCES.
statutes against, construed 311
See Title and Ownership.

EQUIPMENT.
cost with 136

EQUITABLE INTEREST.
owner of designated as assured 553
See Title and Ownership.

ERRONEOUS DESCRIPTION.
reformation 183, 563

ERROR.
of assured in statement 870

[References are to sections.]

ESTOPPEL. SECTION.
age limit ... 936
change of ownership ... 260
general rule ... 258
inquiry ... 261
indemnity and liability insurance ... 784
knowledge of intention to encumber ... 259
negligence ... 317
notice and proof of loss ... 418
reciprocals and inter-insurance ... 974
See Waiver; Waiver and Estoppel.

EVIDENCE.
age limit ... 937
as to cost of car ... 171
as to number of car ... 180
authority of adjuster ... 956
authority of agent ... 577
car operated with consent of owner ... 801
carrying passengers for hire ... 677
certificate of registration ... 164
change of ownership ... 125
conflict ... 171
as to title ... 279
jury ... 428
whether rider to collision policy had been cancelled ... 346
contract of sale unsigned by seller ... 268
cross-examination ... 953
directed verdict ... 168
erroneous answer in proof of loss ... 426
existence of insurance ... 952
fraud ... 697
fraudulent release ... 955
impeachment of award by appraiser ... 440
inadmissible ... 696
certified copy of criminal court proceedings ... 696
complaint charging theft ... 696
estimate of repairs ... 696
memorandum of prosecutor's office in criminal case ... 696
insuring against theft, except by person or persons in assured's household ... 685
letters to show waiver ... 423
locking device on transmission, harmless error ... 669
misrepresentation, year model of car ... 170
negligence of chauffeur ... 957
new or second hand car ... 167
number and year model not identical ... 166
of agency in receiving proof of loss ... 424

[References are to sections.]

EVIDENCE.—(Continued.) SECTION.
of proof of loss, lost in mails 421
of settlement, in action where judgment exceeded amount of insurance 892
of theft 606, 618
ownership 271
parol 267, 268
payment of premium 113
person driving car 954
previous losses 422
proof of misrepresentation 269
question for jury in theft insurance 691
retention of title 267
statement that car was stolen inadmissible 696
stolen car 495
sufficiency 270
valued policies 327
value of car at time of loss 636
waiver and estoppel 103
when insurer refuses to defend 880
See Collision Insurance; Liability Insurance; Procedure; Theft Insurance; Title and Ownership.

EXCEPTION.
agreement to defend 859

EXCESS LIABILITY.
settlement 877

EXCHANGE VALUE.
cost 133
second-hand car 134
representations and warranties 173

EXCHANGE OF CARS.
change of interest, title or possession 235
matters of defense 701

EXECUTION CREDITOR.
liability insurance 891

EXPENSES.
for investigation 856

EXPERT.
evidence 527

[References are to sections.]

F.

FIRE INSURANCE. SECTION.

appeal and error 582
arson 574
burden of proof 579
conversion by insurer 575
criminal misconduct 573
dealer's fire policies 571
covered until delivered to purchaser 572
reporting risks "as known" 571
evidence, authority of agent 577
fire extinguisher 570
fire risks not covered 569
in general 568
jury 581
lessor and lessee 583
measure of damages 580
pleading, value, proof 578
valued policy, depreciation 576

FORECLOSURE.
contract not terminated by 292

FORFEITURE.
See Representation and Warranties; Title and Ownership; Waiver and Estoppel.

FRAUD.
appraisal 442
conflict of evidence 526
fraudulent trick, scheme or device 597, 605
good faith 150, 155, 186
location of car 191
no intention to deceive 160
of agent 557
representations and warranties 128
theft insurance 697, 703
use of insured car 191
will avoid policy 322

FRAUDULENT SCHEME, TRICK OR DEVICE.
See Theft Insurance.

FULL COVERAGE POLICY.
failure of agent to deliver 554

[References are to sections.]

FACE AMOUNT OF POLICY. SECTION.
liability limited to 850, 876

FAILURE TO DEFEND.
insurer's liability 849

FALLING DOWN ELEVATOR SHAFT.
collision insurance 733

FALSE STATEMENT.
notice and proof of loss 410, 414

FEDERAL RULE.
of waiver and estoppel 85

FIRE.
cause of 528
negligence after 314

FIRE EXTINGUISHER.
See Fire Insurance.

G.

GARAGE.
disappearance of car from 615

GARNISHMENT.
liability insurance 783, 789

GENERAL AGENT.
waiver and estoppel 406
notice and proof of loss 406

GOOD FAITH.
not a defense 150
question for jury 186
assured who acts in 152
representations and warranties 155, 186

GROSS NEGLIGENCE.
matters of defense 700
See Negligence.

[References are to sections.]

H.

HEARSAY EVIDENCE. SECTION.
appeal and error 549
See Evidence; Procedure.

HUSBAND AND WIFE.
unconditional and sole owners 244

I.

IDENTITY.
evidence 525
jury 185
number of car 180, 285

ILLEGAL.
transportation of liquor 291

"IMMEDIATE".
notice and proof of loss 391

INCENDARISM.
evidence of 522

INDEMNITY AND LIABILITY INSURANCE DISTINGUISHED.
libility insurance 777

INDEMNITY BOND.
insuring against violation of city ordinance 774

INDIVIDUALS.
may conduct insurance business 3

INJURED CLAIMANT'S RIGHT OF ACTION.
liability insurance 782, 796

INJURIES.
sustained by president 908

INQUIRY.
estoppel 258
none by agent as to encumbrance 221

INSOLVENCY.
judgment creditor 961
liability insurance 790, 808

[References are to sections.]

INSTRUCTIONS. SECTION.
agency ... 72
failure to call witness ... 277
representations and warranties ... 127
theft insurance ... 638
measure of recovery ... 638
title and ownership ... 276
unconditional ownership ... 276
See Procedure.

INSURABLE INTEREST.
bill of sale ... 21
conditional sales ... 22
contract of indemnity ... 19
how affected by provision against other insurance ... 212
in general ... 16
mortgagee ... 294
mortgagor and mortgagee ... 23
statutory requirements ... 20
stolen car insured ... 24
what is an insurable interest ... 17
when insurable interest must exist ... 18
See Title and Ownership.

INSURANCE.
liability as a contract of ... 893

INSURANCE CORPORATIONS.
creatures of law ... 2

INSURED.
prohibited from interfering with settlement ... 888
settling without consent of insurer ... 878

INSURER.
conducting defense ... 776
not liable where assured voluntarily pays judgment ... 890
settlement ... 875
when not liable for acts of assured's chauffeur ... 912
when obligated to greater extent than required by statute ... 915

INSURER'S LIABILITY.
actual cost to assured including equipment
defined ... 353
authority of adjuster ... 365
agent of insurer ... 366
election to repair ... 367

[References are to sections.]

INSURER'S LIABILITY.—(Continued.) SECTION.
burden of proof 378
deductible clause 364
exercise of option 354
in general 347
insurer's liability reduced 357
interest 369
maturity of policy 369
Michigan statute 372
sixty days after proof of loss 370
unliquidated damages 371
lien for repairs 363
list price 362
new contractual relationship 355
option to repair 350
partial loss 349
pleading 377
procedure 501
"repair" or "replace" defined 351
disaffirmance 375
fraud 374
reservation of rights 376
right of recovery, partner 368
rights of assignee 358
salvage 359
estoppel 361
right of action 360
statute supercedes policy condition 373
suitable repairs and replacements, defined 352
total loss 348
unreasonable delay 356
See Representations and Warranties; Waiver and Estoppel; Title and Ownership.

INSURER'S LIABILITY SUBECT TO CONDITIONS OF POLICY.
liability insurance 781

INSURING AGAINST THEFT EXCEPT BY PERSON OR PERSONS IN ASSURED'S HOUSEHOLD.
See Theft Insurance.

INTENT.
See Theft Insurance.

INTER-INSURANCE EXCHANGE.
See Mutual Associations and Reciprocals.

[References are to sections.]

J.

JOINT DEFENDANTS. SECTION.
burden of proof 813

JUDGMENT.
attorney fees for vexatious delay 187
collateral attack 960
exceeding amount of insurance, settlement 892
excessive 959
insurer not liable where assured voluntarily pays 890
paying with promissory note 792, 794
payment of 751
representation or warranty as to number 187
settlement after 884
time of payment of 550
to what extent conclusive 805
when action accures on 551
when obtained without knowledge of insurer 806
See Procedure.

JURY.
agency 67
brokerage 83
fire insurance 581
liability insurance 873, 958
locking device warranty 659
misrepresentation to adjuster 126
notice and proof of loss 428, 429
conflict in evidence 428
waiver 429
representations and warranties
cost 140
model 169
number 184
good faith 186
indentity 185
illustrations 185
right to trial by 958
theft insurance
abandonment 620
bailee 623
employee 622
evidence of theft 606
fraud 703
in general 619
"joy rider" 621

[References are to sections.]

JURY.—(Continued.) SECTION.
measure of recovery ... 639
record owner ... 624
title and ownership
certificate as evidence of ownership ... 282
conflict in evidence ... 279
in general ... 278
mortgage ... 281
statute ... 280
waiver and estoppel ... 104
See Procedure.

K.

KNOWLEDGE.
agreement to defend ... 847
carrying passengers for hire ... 673
constitutes implied waiver of title warranty ... 250
of encumbrance ... 272
of intention to encumber ... 259
of other insurance ... 213
representations and warranties ... 119
waiver and estoppel ... 89
knowledge imputed ... 90
See Title and Ownership.

L.

LEGISLATION.
public policy ... 768

LIABILITY INSURANCE.
accident "caused by automobile" construed ... 903
accident, definition ... 894
agreement to defend ... 838
assured may make settlement ... 842
attorney fees ... 858
bond and poundage fees as costs ... 857
burden of proof ... 853
liability for failure to perfect appeal ... 851
optional contract ... 853
criminal suits not included ... 839
election to defend ... 841
exception ... 859
expenses for investigation ... 856
in general ... 838
insurer liable for court costs ... 855

[References are to sections.]

LIABILITY INSURANCE.—(Continued.) SECTION.
insurer's liability for failure to defend ... 849
knowledge ... 847
laches ... 846
liability fixed by amount of policy ... 850
malpractice as defense ... 848
"No action clause" ... 861
private counsel ... 860
refusal to defend ... 840
reserving question of liability ... 845
right to abandon ... 854
estoppel by conduct ... 854
settlement without judgment ... 843
waiver ... 844
age limit ... 932
burden of proof ... 938
estoppel ... 936
evidence ... 937
illustrations ... 934
in general ... 932
statute ... 935
valid ... 933
appreciation in value ... 900
assured signing minor's application for license ... 922
assured's loss as member of partnership ... 920
assured's right of recovery for wife's injuries ... 924
change of interest ... 917
change of motor ... 909
claims on account of bodily injuries ... 897
contract of insurance ... 893
cooperation of assured ... 862
assured insolvent ... 871
assured's obligation to cooperate ... 863
discrepancy in statement ... 868
error ... 870
mistake ... 869
in general ... 862
jury ... 873
prosecution of assured's action ... 866
refusal of assured to defend on ground of contributory negligence 867
waiver ... 872
what constitutes failure to cooperate ... 865
what cooperation means ... 864
deductible clause ... 925
duress ... 905
indemnity and liability insurance distinguished ... 777

[References are to sections.]

LIABILITY INSURANCE.—(Continued.) SECTION.
estoppel ... 784
garnishment ... 783
illustrations ... 780
in general ... 777
injured claimant's right of action ... 782, 796
insurer's liability subject to conditions of policy ... 781
liability policy, rule of construction ... 779
"No action" clause—indemnity policy ... 785
absence of "no action" clause ... 788
garnishment ... 789
general rule ... 786
in equity, receivership ... 791
in general ... 785
insolvency or bankruptcy ... 790
minority view ... 795
paying judgment with promissory note ... 792
borrowed money ... 794
execution sale ... 793
miscellaneous ... 793
injuries sustained by president ... 908
interest ... 901
liability of insurer for negligence of dependent members of insured's family ... 916
liability policy for public benefit ... 914
jitney policy ... 914
loss and expense by reason of claims made upon assured ... 913
measure of recovery ... 904
negligence ... 895
notice of accident or claim ... 820
condition precedent ... 821
due diligence ... 823
"loss" construed ... 830
miscellaneous illustrations ... 827
newspaper notice ... 824
notice as affecting rights of injured claimant ... 828
notice not necessary where party to suit ... 826
notice to broker ... 825
pleading ... 829
rule of reasonable construction ... 822
statute ... 831
waiver ... 832
burden of proof ... 837
option to defend or deny liability for failure to give notice ... 834
pleading ... 835
waiver clause construed ... 833

[References are to sections.]

LIABILITY INSURANCE.—(Continued.) SECTION.
omnibus coverage clause ... 926
additional assured, defined ... 928
assured, defined ... 927
in general ... 926
not an accident policy ... 931
not words of limitation ... 930
permission to use, construed ... 929
"one driver" clause ... 910
policy issued to partnership ... 902
procedure ... 939
appeal ... 946
attorney fees ... 943
costs—deductible clause ... 963
evidence ... 952
authority of adjuster ... 956
cross-examination ... 953
existence of insurance ... 952
fraudulent release ... 955
negligence, chauffeur ... 957
person driving car ... 954
insolvent judgment creditor ... 961
interest ... 962
judgment ... 959
collateral attack ... 960
excessive ... 959
jury, right of trial by ... 958
pleading ... 947
answer ... 949
appeal bond ... 949
defense ... 950
negligence ... 950
presumption as to expiration of policy ... 947
sufficiency as to averment of non-payment ... 948
wrongful interference with contractual rights ... 951
public policy ... 767
indemnity bond insuring against violation of city ordinance ... 774
insurer conducting defense ... 776
legislation ... 768
liability for criminal negligence ... 772
where negligent conduct constituted criminal offense ... 773
negligence ... 775
statutory regulations ... 769
operating car by one under age ... 770
operating car without license ... 769
policy conditions, validity ... 771

[References are to sections.]

LIABILITY INSURANCE.—(Continued.) SECTION.
right of injured claimant to recover from insurer 796
in general 796
insolvency 808
judgment 805
to what extent conclusive 805
when obtained without knowledge of insurer 806
liability imposed by law 804
policy creating separate right of action 799
policy inuring to benefit of injured claimants 800
car operated with consent of owner 801
evidence 801
joint tort-feasor 802
public conveyance for carrying passengers 803
procedure—pleading and practice 809
costs 819
defense 815
right to repudiate liability 816
execution unsatisfied 817
joinder 818
joint defendants, burden of proof 813
judgment on writ of inquiry, notice 810
parties 811
constitutionality 812
right of action, partnership 809
statutes 807
terms of policy 797
settlement 874
after judgment 884
by assured without consent of insurer 878
by insurer 875
clause prohiting assured from interfering with settlement of suits, construed 888
duress 885
evidence 892
in action where judgment exceeded amount of insurance 892
execution creditor 891
in general 874
insurer not liable where assured voluntarily pays judgment against daughter 890
liability limited to face amount of policy 876
no provision that insurer shall defend 886
releases insurer from liability 887
right of insured to protect himself against excess liability 877
"to interfere in negotiations for compromise" construed 889
when insurer refuses to defend 879

[References are to sections.]

LIABILITY INSURANCE.—(Continued.) SECTION.
clause for payment after trial and judgment construed..... 882
evidence 880
waiver 881
when recommended by insurer's attorney..... 883
test of business uses..... 919
"use and operation of vehicles in insured's business"..... 907
"use at time of accident"..... 896
"use by himself"..... 911
"use in public service"..... 906
valued policy..... 899
violation of speed law..... 921
what constitutes "one accident",..... 898
when insurer not liable for acts of assured's chauffeur..... 912
where insurer obligates itself to greater extent than required by statute 915
where "other's liability assumed under contract",..... 923

LIABILITY OF INSURER.
for negligence of dependent members of insured's family..... 916

LIMITIATION OF ACTION.
procedure 502

LIQUIDATION.
mutual associations 967

LOCKING DEVICE WARRANTY.
See Theft Insurance.

LOSSES.
See Risks and Casues of Losses.

M.

MALPRACTICE.
as defense..... 818

MARITIME INSURANCE.
collision 707

MASSACHUSETTS.
compulsory motor vehicle act..... 8
statute as to notice and proof of loss..... 415

[References are to sections.]

MEASURE OF DAMAGES. SECTION.
instructions 541
notice and proof of loss 394
recovery of automobile 651
See Collision, Fire and Theft, and Liability Insurance.

MINOR.
assured signing application for license of 922

MISREPRESENTATION.
defeats recovery 146
new car 145
proof of 269
second-hand car 323
See Representations and Warranties.

MISSOURI STATUTE.
three-fourth's value policy 324

MISTAKE.
engine number 183, 566
place of keeping car 191
statement of assured 869

MODEL.
description 144
See Representations and Warranties.

MODIFICATION OF POLICY.
jury 545

MOTOR VEHICLE ACT.
compulsory 7

MORTGAGE CLAUSE.
notice and proof of loss 397
policy as affected by title warranty 281
mortgage paid but not satisfied of record 229
title and ownership 281
See Insurable Interest; Mortgagee Interest; Mortgagor and Mortgagee.

MORTGAGEE INTEREST.
as affected by provision against other insurance 215
change in purchase notes 310
detchment of mortgage clause after payment of debt 309
embezzlement rider 308

[References are to sections.]

MORTGAGEE INTEREST.—(Continued). SECTION.
insurable interest ... 294
"loss, if any, payable to mortgagee, as his interest may appear", defined ... 300
carrying passengers for hire—waiver ... 302
exception, where mortgagee is coassured ... 303
other insurance ... 301
loss payable clause defined ... 295
knowledge ... 297
mortgagee can take possession ... 299
notice of encumbrance ... 296
vendor and vendee ... 298
mortgagee not bound by mortgagor's settlement ... 307
mortgagor and mortgagee ... 205
notice and proof of loss ... 397
payment to mortgagee ... 667
waiver ... 306
pleading and practice—parties ... 312
policy form protecting interests of mortgagee ... 304
representations and warranties ... 205
statutes against encumbrances construed ... 311
vendor and vendee ... 305
See Title and Ownership.

MORTGAGOR AND MORTGAGEE.
other insurance ... 215
See Insurable Interest; Mortgage Clause; Mortgagee Interest.

MOTION.
for judgment notwithstanding verdict ... 129

MUTUAL ASSOCIATIONS AND RECIPROCALS.
mutual associations ... 964
approval of policy forms by superintendent of insurance ... 966
assessments ... 967
attorney fees ... 968
by-laws ... 969
defense of action ... 969
in general ... 964
liquidation ... 967
rules of association ... 965
statute ... 968
transfer ... 965
waiver ... 969
reciprocals or inter-insurance exchange contract one of insurance ... 971

[References are to sections.]

MUTUAL ASSOCIATIONS AND RECIPROCALS.—(Continued). SECTION.
estoppel 974
failure to deny liability 978
in general 970
limitation of authority 972
negotiations for settlement 978
receiver 975
creditor's bill proper remedy 977
parties 976
"reciprocal" and "mutual" distinguished 973
right of action 979

N.

NEGLIGENCE.
after fire 314
estoppel 317
failing to act on application 316
fraudulent or wilful destruction 315
in general 313
insurer cannot defend where its agent negligent 157
liability insurance 775, 895
of dependent members of insured's family 916
proof of 481
statute nullifies conflicting policy condition 318

NEGOTIATIONS FOR SETTLEMENT.
reciprocals 978

NEW CAR.
what constitutes 542

NON-SUIT.
notice and proof of loss 430

NON-WAIVER AGREEMENT.
See Appraisal, Arbitration and Award.

NOTES.
change in, given for purchase of car 310

NOTICE
appraisal 451
as affecting rights of injured claimant 828
cancellation 332
conversion or embezzlement insurance 758

[References are to sections.]

NOTICE.—(Continued). SECTION.
newspaper 824
not necessary where party to suit 826
of accident or claim 820-837
of encumbrance 222
mortgagee interest 296
option to defend or deny liability for failure to give 834
to broker 825
See Notice and Proof of Loss; Liability Insurance; Waiver and Estoppel.

NOTICE AND PROOF OF LOSS.
appeal and error 433
burden of proof 427
condition precedent 394
denial of liability on other grounds 400
evidence 421
agency 424
erroneous answer in proof of loss 426
letters, waiver 423
notice lost in mails 421
other insurance, cars permitted to burn 425
previous losses 422
false statement 410
exception 413
general rule 411
illustrations 412
overvaluation 414
finding 431
"forthwith" or "immediate" notice 391
illustrations 392
in general 389
jury 428
conflict in evidence 428
waiver 429
Massachusetts statute 415
mortgage clause 397
non-suit 430
penalty and damages 432
pleading 420
policy requirements 395
proof of mailing 396
reasonable and valid 390
right of action 416
conduct 416
estoppel 418

[References are to sections.]

NOTICE AND PROOF OF LOSS.—(Continued). SECTION.
repudiation of agreement ... 419
waiver, reservation of right ... 417
time ... 398
valid and binding ... 393
waiver and estoppel ... 399
accepting statement and admitting liability ... 401
agents ... 405
adjuster ... 407
general agent ... 406
local agent ... 408
special agent ... 409
conduct ... 402, 403, 404
See Waiver and Estoppel.

O.

OMNIBUS COVERAGE CLAUSE.
liability insurance ... 926-930

"ONE ACCIDENT".
liability insurance ... 898

"ONE DRIVER" CLAUSE.
liability insurance ... 910

ONE WHO CLAIMS OWNERSHIP.
intent to steal ... 592

OPEN OR VALUED POLICIES.
See Valued Policies.

OPEN POLICY.
automobile dealers' ... 689
covering many cars ... 121
See Valued Policies.

OPERATING CAR.
by one under age ... 770
without license ... 769

OPINION.
of adjuster ... 524

[References are to sections.]

OPTION. SECTION.
exercise of 354
to repair 350
See Insurer's Liability.

OTHER INJURIES.
See Subrogation.

OTHER INSURANCE.
cars permitted to burn 425
description 207
See Representations and Warranties.

OTHER INTERESTS.
title and ownership 255

"OTHER'S LIABILITY ASSUMED UNDER CONTRACT".
construed 923

OVERVALUATION.
representations and warranties 138

OWNERSHIP.
procedure 514

P.

PAROL.
evidence 267, 521
contract of sale unsigned 268

PAROL EVIDENCE.
See Evidence.

PARTIES.
assignment 511
conditional sales contract 510
joint payees 513
liability insurance 811
mortgagee interest 312
receiver 976
reciprocals 976
separate interests 512
theft insurance 694
See Procedure.

[References are to sections.]

PARTNER. SECTION.
assured's loss as 920
right of recovery 368
wilful burning 290

PARTNERSHIP.
policy issued to 902

PAYMENT.
waiver of, to mortgagee 306

PENALTY.
and attorney fees 641
and damages 432

PLACE OF KEEPING.
description 188

PLEADING.
insurer's liability 377
liability insurance 829
measure of liability 465
mortgagee interest, parties 312
notice and proof of loss 420
premium 112
reformation 565
representations and warranties 123
use of insured automobile 206
subrogation 487
theft insurance, procedure 693-695
locking device, burden of proof 668
title and ownership 695
title and ownership 262
valued policies 329
election 329
total loss 330
value, proof 578
waiver, notice of accident or claim 832
See Liability Insurance; Procedure.

POLICY CREATING SEPARATE RIGHT OF ACTION.
right of injured claimant to recover from insurer 799, 800

POLICY ISSUED TO ANOTHER.
procedure 534

[References are to sections.]

POLICY REQUIREMENTS. SECTION.
notice and proof of loss ... 395

POSSESSION.
measure of recovery ... 634

PREJUDICE.
jury ... 544

PREMIUM.
agency ... 109
evidence ... 113
pleading ... 112
rate ... 151
retaining, with knowledge of breach ... 666
return of unearned premium ... 110
breach of title warranty ... 256
waiver ... 111

PRESUMPTION.
of theft ... 607

PRIVATE GARAGE.
construed to cover addition to barn ... 194

PRIVILEGED COMMUNICATION.
attorney and client ... 504

PROCEDURE; PLEADING AND PRACTICE; EVIDENCE; INSTRUCTIONS, ETC.
agent—dual capacity—void contract ... 506
amendment, limitation of action ... 516
answer ... 517
defense not pleaded ... 519
former action ... 517
limited liability ... 518
when special plea of waiver not necessary ... 520
appeal and error ... 548
hearsay evidence ... 549
verdict of jury ... 548
assignment ... 507
oral contract ... 508
attorney and client ... 503
fees ... 503
privileged communication ... 504
right of insured's attorney to represent injured claimant ... 505

[References are to sections.]

PROCEDURE, ETC.—(Continued). SECTION.
burden of proof ... 538
complaint ... 514
ownership ... 514
waiver and estoppel, sufficiency ... 515
evidence ... 521
additional insurance ... 532
admission ... 523
cancellation ... 536
conflicting, fraud ... 526
directed verdict ... 537
expert ... 527
cause of fire ... 528
identity ... 525
incendiarism ... 522
opinion of adjuster ... 524
parol ... 521
policy issued subject to another ... 534
process of elimination ... 535
sufficiency ... 533
undelivered bill of sale ... 531
value ... 529
fraud ... 530
instructions ... 539
deliberate act ... 540
duress ... 539
measure of recovery ... 541
waiver of defenses ... 543
what constitutes new car ... 542
insurer's liability ... 501
judgment ... 550
right of action, when accrues ... 551
time of payment ... 550
jury ... 544
conflict in findings ... 547
modification of policy ... 545
prejudice ... 544
vexatious refusal to pay loss ... 546
limitation of action ... 502
See Collision, Fire, Theft and Liability Insurance.

PROCESS OF ELIMINATION.
evidence ... 535

PROMISSORY NOTE.
for part of purchase price ... 228

[References are to sections.]

PROMISSORY NOTE.—(Continued). SECTION.
paying judgment with 792
title and ownership 266

PROMISSORY WARRANTY.
use of insured car 202
See Representations and Warranties.

PROOF.
prima facie 608
reformation of policy 567
theft insurance 698

PROOF OF MAILING.
notice and proof of loss 396

PUBLIC CONVEYANCE FOR CARRYING PASSENGERS.
policy inuring to benefit of injured claimants 800

PUBLIC POLICY.
insured car driven contrary to law 286
liability insurance 767
provision as to other insurance 210
See Liability Insurance.

R.

RATE-MAKING.
location material factor in 189

RATIFICATION.
See Waiver and Estoppel.

REASONABLE AND VALID.
change of interest, title or possession 232
notice and proof of loss 390
other insurance 211

RECEIVER.
"no action" clause 791
creditor's bill proper remedy 977
parties 976

RECIPROCALS.
See Mutual Associations and Reciprocals.

[References are to sections.]

RECORD OWNER. SECTION.
theft insurance 624

RECOVERY OF AUTOMOBILE.
theft insurance 643

REFORMATION.
by-laws 559
failure of agent to deliver full coverage policy 554
fraud of agent 557
illustrations, laches will prevent 561
in general 552
owner of equitable interest designated as assured 553
policy written by agent who examined car 556
procedure 563
erroneous description 563
mistake in engine number 566
pleading 565
proof 567
recovery cannot be had without reformation 564
reformation denied 560
failure of assured to inform broker as to his interest in insured car 562
in general 560
soliciting agent 555
transfer of car, failure of agent to change policy 558

REFUSAL TO DEFEND.
liability insurance 840
on groun of contributory negligence 867
right to abandon defense 854
estoppel by conduct 854

REGISTRATION.
as affecting unconditional and sole ownership clause 248
car driven contrary to law without 287
certificate of 164
subrogation 498
waiver 760

RELEASE.
agent's representation 649
consideration 648

RELEASE OF WRONGDOER BY ASSURED.
subrogation 486

[References are to sections.]

REMOVAL OF SPARE TIRE. SECTION.
theft insurance ... 614

RENEWAL POLICY.
construction ... 43

RENTING.
theft insurance ... 603

REPAIRS.
lien for ... 363
option ... 350

REPAIR SHOP.
disappearance of car from ... 616

REPLEVIN.
to recover stolen car ... 496

REPRESENTATIONS AND WARRANTIES.
construction ... 118
cost ... 131
accessories ... 135
exchange value ... 133
second-hand car ... 134
illustrations ... 132
in general ... 131
inspection ... 141
jury ... 140
of financing ... 139
overvalution ... 138
statute ... 143
valued policies ... 142
with equipment ... 136
description ... 131
cost ... 131
model ... 144
number ... 176
other insurance ... 207
place of keeping ... 188
use ... 196
defense ... 124
distinguished ... 117
evidence ... 125
instructions ... 127
fraud ... 128

[References are to sections.]

REPRESENTATIONS AND WARRANTIES.—(Continued). SECTION.
knowledge ... 119
misrepresentation ... 114
to adjuster ... 126
jury ... 126
model ... 144
agent ... 158
appeal and error ... 175
assured who acts in good faith ... 152
conduct ... 163
correct number and type of car ... 154
correct serial but erroneous year model ... 153
estoppel, husband and wife ... 174
evidence ... 164
certificate of registration ... 164
directed verdict ... 168
new or second-hand ... 167
number and year model not identical ... 166
failure of assured to read statement ... 156
good faith ... 155
higher premium rate ... 149
in general ... 144
insurer cannot defend where its agent negligent ... 157
jury ... 169
evidence ... 170
conflict ... 171
exchange value ... 173
incorrect description ... 172
material fact ... 148
misrepresentation defeats recovery ... 146
misrepresentation, new car ... 145
no intention to deceive ... 160
premium rate ... 151
subsequent conversation ... 162
temporary use—vexatious refusal to pay ... 161
where insurer would have rejected application ... 150
good faith not a defense ... 150
where solicitor makes personal examination ... 159
motion for judgment notwithstanding verdict ... 129
number ... 176
evidence ... 180
examination by insurer's agent ... 182
identity ... 180
defense ... 181
mistake ... 183
illustrations ... 178
correct number concealed ... 178

[References are to sections.]

REPRESENTATIONS AND WARRANTIES.—(Continued). SECTION.
knowledge ... 178
identity ... 179
in general ... 176
judgment ... 187
jury ... 184
illustrations ... 185
good faith ... 186
identity ... 185
in general ... 184
matter of description ... 177
other insurance ... 207
general rule ... 208
exception ... 209
illustrations ... 213
conditional sales contract ... 213
knowledge ... 213
master policy ... 213
buyer's interest voided ... 214
in general ... 207
mortgagee ... 215
no application to insurable interests not covered ... 212
provision reasonable ... 211
public policy ... 210
waiver ... 216
open policy covering many cars ... 121
place of keeping ... 188
erroneous description ... 190
fraud or mistake ... 191
in general ... 188
knowledge ... 192
waiver ... 193
location material ... 189
factor in rate-making ... 189
private garage construed to cover addition to barn ... 194
"when not in use the car shall be kept in a garage" construed ... 195
pleading ... 123
renewal ... 122
statute ... 120
untrue statement ... 120
not made by assured ... 120
use of insured automobile ... 196
compensation ... 200
defined ... 198
descriptive ... 201
illustrations ... 203
in general ... 196

[References are to sections.]

REPRESENTATIONS AND WARRANTIES. (Continued). SECTION.
intention to deceive ... 199
immaterial ... 199
mortgagor and mortgagee ... 205
as their interests may appear ... 205
pleading ... 206
condition subsequent ... 206
promissory warranty ... 202
warranties ... 116
See Title and Ownership; Waiver and Estoppel.

RESERVE.
state regulation ... 5

RESERVING QUESTION OF LIABILITY.
liability insurance ... 845

RETURN OF INSURED CAR.
reasonable time ... 644

RETURN OF UNEARNED PREMIUM.
See Premium.

RIDER.
See Construction of the Policy; Embezzlement Insurance.

RIGHT OF ACTION.
agency ... 65
appraisal ... 452
assignment ... 51
disaffirmance ... 375
for wife's injuries ... 924
fraud ... 374
indemnity policy, "no action" clause ... 785
minority view ... 795
liability policy ... 779
payment of judgment with promissory note ... 792
procedure ... 939
right of injured claimant to recover from insurer ... 796
notice and proof of loss ... 416-419
conduct ... 416
estoppel ... 418
repudiation of agreement ... 419
reservation of rights ... 417
reciprocals or inter-insurance exchange ... 979
reservation of rights ... 376

[References are to sections.]

RIGHT OF ACTION.—(Continued). SECTION.
subrogation 483-489
in general 483
insurer against bailee 492
joint action, where damage to insured car exceeds amount of policy 488
misstatement in proof of loss 489
subsequent purchaser 497
separate suits for injury to person and property 485
settlement 477-482
when accures on judgment 551
See Procedure; Representations and Warranties; Waiver and Estoppel; Title and Ownership.

RIGHT OF INJURED CLAIMANT TO RECOVER FOR INJURIES.
See Liability Insurance.

RISKS AND CAUSES OF LOSSES.
chattel mortgage creditor 288
contract not terminated by foreclosure 292
countersigning 283
duration of risk 283
hazards not covered 293
identity of insured car 285
illegal transportation of liquor 291
insured car driven contrary to law—public policy 286
registration—unlicensed chauffeur 287
partnership-wilful burning 290
value of car—price reduced 289
See Representations and Warranties; Title and Ownership; Waiver and Estoppel.

ROAD-BED.
exclusion clause 717
See Collision Insurance.

RULES OF CONSTRUCTION.
liability policy 779
reasonable 822
See Construction of the Policy.

S.

SALVAGE.
estoppel 361
insurer's liability 359
neglect to tender 459
right of action 360

[References are to sections.]

SELLER'S INSTRUCTOR. SECTION.
intent to steal ... 589

SEPARATE SUITS.
for injury to person and property ... 485

SETTLEMENT.
assured may make ... 842
by and between assured and tort-feasor ... 477
insurer's right of action against assured ... 477
laches ... 478
insurer's right of action against third party ... 479
antecedent settlement ... 482
other injuries ... 480
proof of negligence and right of action ... 481
liability insurance ... 874
mortgagee not bound by mortgagor's ... 307
reciprocals ... 978
without judgment ... 843
See Liability Insurance.

SOLICITING AGENT.
agency ... 60
personally examines car ... 159
representations and warranties ... 159
reformation ... 555

SOLICITOR FEES AND COSTS.
theft insurance ... 650

SPECIAL AGENT.
notice and proof of loss ... 409
waiver and estoppel ... 409

STANDARD FORM POLICY.
state regulation ... 13

STATE REGULATION.
admission of foreign companies ... 5
automobile insurance ... 6
compulsory motor vehicle insurance acts ... 7
Connecticut ... 10
Massachusetts ... 8
New Hampshire ... 9
individuals may conduct insurance business ... 3
in general ... 1

[References are to sections.]

STATE REGULATION.—(Continued). SECTION.
insurance corporations creatures of law 2
motor vehicle acts—
California 11
Iowa 11
New York 11
reserve 15
standard form policy 13
statutory enactments 12
taxation 14

STATUTE.
age limit 935
enactment concerning encumbrances 226, 227, 247, 275
nullifies existing policy condition 318
supercedes policy condition 373

STATUTORY ENACTMENTS.
insurable interest 20
operating car by one under age 770
operating car without license 769
state regulation 12
validity of policy conditions 771

STOLEN CAR.
insurable interest 24
insured 494
subrogation 494
title and ownership 249

SUBROGATION.
assignment 474
conditional vendor negligent 490
conventional subrogation 470
evidence, stolen car 495
illustrations 471
garage keeper 472
partner 471
railroad 473
insurer's right of action against assured for misstatement in proof of loss 489
insurer's right of action against bailee 492
joint action, where damage to insured car exceeds amount of policy 488
liability of seller for conversion 491
measure of recovery 500
negligence 476

[References are to sections.]

SUBROGATION.—(Continued). SECTION.
proof—conventional subrogation 493
registration 498
release of wrongdoer by assured 486
pleading 487
replevin to recover stolen car 496
right of action against subsequent purchaser 497
right of action—
in general 483
illustrations 484
right of subrogation 469
separate suits for injury to person and property 485
settlement by and between assured and tort-feasor 477
insurer's right of action against assured 477
laches 478
insurer's right of action against third party 479
antecedent settlement 482
other injuries 480
proof of negligence and right of action 481
statutes 475
stolen insured car 494
theft insurance 663
waiver 499

SUBSEQUENT CONVERSATION.
representations and warranties 162

SUFFICIENCY.
of evidence 533

SUITABLE REPAIRS AND REPLACEMENTS.
construed 352

SUPERINTENDENT OF INSURANCE.
approval of policy forms by 966

SURRENDER OF POLICY.
cancellation 339

T.

TEMPORARY USE.
vexatious refusal to pay 161

TERMINATION OF POLICY.
cancellation 341

[References are to sections.]

TERMS OF POLICY. SECTION.
liability insurance ... 797

TEST OF BUSINESS USES.
construed ... 919

THEFT INSURANCE.
automobile dealers' open policy ... 689
burden of proof ... 690
covering until car "delivered to the purchaser or until same otherwise passes out of possession" ... 689
evidence ... 691
measure of recovery ... 692
carrying passengers for hire ... 671
application ... 671
diligence alone not sufficient ... 674
duty of insured ... 672
evidence ... 677
knowledge ... 673
rented ... 676
suspended ... 675
definition ... 586
evidence of theft ... 606
in general ... 606
illustrations ... 607
boat ... 617
borrower ... 611
conditional vendee ... 618
conversion ... 610
disapperance from garage ... 615
employee ... 613
"joy-rider" ... 612
presumption ... 607
prima facie proof ... 608
removal of spare tire ... 614
repair shop ... 616
unsupported evidence of assured ... 609
jury ... 619
bailee ... 623
employee ... 622
illustration—abandonment ... 620
in general ... 619
"joy-rider" ... 621
record owner ... 624
fraudulent trick, scheme or device ... 597
bailee ... 604
borrowing ... 602

[References are to sections.]

THEFT INSURANCE.—(Continued). SECTION.
common law ... 598
conditional sales ... 605
in general ... 597
prevailing rule ... 600
renting ... 603
statute ... 599
in general ... 584
insuring against theft except by person or persons in assured's household ... 678
bailment ... 684
burden of proof ... 687
caretaker ... 680
defense ... 686
employee ... 681
evidence ... 685
gardener ... 683
in general ... 678
jury ... 688
nephew ... 679
volunteer ... 682
intent ... 587
illustrations ... 588
abandonment ... 596
chauffeur ... 594
garage employee ... 593
gardener ... 590
"joy rider" ... 595
one who claims ownership ... 592
seller's instructor ... 589
unknown ... 591
wife ... 588
interpretation ... 585
locking device ... 653
construction ... 660
defense ... 662
descriptive ... 661
due diligence ... 658
jury ... 659
evidence, harmless error ... 669
exception, where premium is not reduced ... 656
finding, vexatious delay ... 670
general rule ... 654
in general ... 653
illustrations ... 655
pleading, burden of proof ... 668

[References are to sections.]

THEFT INSURANCE.—(Continued). SECTION.
subrogation 663
suspended 657
waiver 664
adjuster 665
condition subsequent 664
payment of mortgagee 667
retaining premium 666
knowledge of breach 666
measure of recovery 625
appeal and error, illustrations 642
burden of proof 637
collision 630
conditional purchaser 633
construction 628
rider 628
conversion 626
depreciating rate schedule 629
diminution of value 627
evidence 636
in general 625
instruction 638
interest 640
jury 639
loss of rectifier 631
partial loss 635
penalty and attorney fees 641
possession 634
procedure 693
burden of proof 702
evidence 696-698
fraud 697
immateriality 696
proof 698
jury 703
fraud 703
matters of defense 699
exchange of cars 701
gross negligence 700
policy condition 699
parties 694
pleading 695
title and ownership 695
recovery of automobile 643
abandonment 645
cooperation 647

[References are to sections.]

THEFT INSURANCE.—(Continued). SECTION.
duty of insurer ... 646
in general ... 643
measure of damages ... 651
release ... 648, 649
agent's representation ... 649
consideration ... 648
return of insured car ... 644
reasonable time ... 644
solicitor fees and costs ... 650
value ... 652
See Representations and Warranties; Title and Ownership Waiver and Estoppel.

THIRD PARTY.
insurer's right of action against ... 479
See Subrogation.

TIME.
notice and proof of loss ... 398

TITLE AND OWNERSHIP.
burden of proof ... 263
chattel mortgage ... 264
purchase money notes ... 266
title ... 265
waiver ... 263
change of interest, title or possession ... 232
decree of court ... 236
definition ... 233
exchange ... 235
reasonable and valid ... 232
statutory enactment ... 237
what constitutes ... 234
defense ... 274
agency ... 274
statutory provision ... 275
encumbrances ... 218
additional mortgage ... 220
encumbered after issuance of policy ... 224
in general ... 218
mortgage paid but not satisfied of record ... 229
no inquiry by agent as to encumbrance ... 221
notice ... 222
promissory note for part of purchase price ... 228
statutory enactment ... 226

[References are to sections.]

TITLE AND OWNERSHIP.—(Continued). SECTION.
prevails over policy provision ... 226
right to defend ... 227
theft policy ... 219
trust deed satisfied before loss ... 225
verbal agreement ... 230
void chattel mortgage ... 223
estoppel ... 258
change of ownership ... 260
general rule ... 258
inquiry ... 261
knowledge of intention to encumber ... 259
evidence ... 267
encumbrance—knowledge ... 272
finding ... 273
ownership ... 271
parol ... 267
contract of sale unsigned by seller ... 268
proof of misrepresentation ... 269
sufficiency ... 270
forfeiture ... 231
in general ... 217
instructions ... 276
failure to call witness ... 277
unconditional ownership ... 276
jury ... 278
certificate as evidence of ownership ... 282
conflict in evidence ... 279
in general ... 278
mortgage ... 285
statute ... 286
pleading ... 262
unconditional and sole owner ... 238
as their interests may appear ... 246
bill of sale delivery ... 245
conditional sale purchaser ... 238
dealer's agent ... 241
lease ... 242
theft insurance ... 239
when agreed to by insurer ... 240
husband and wife ... 244
joint ownership for an intervening period ... 243
registration ... 248
statutes ... 247
stolen car insured ... 249
waiver knowledge ... 250

[References are to sections.]

TITLE AND OWNERSHIP.—(Continued). SECTION.
adjuster 253
conditional sales contract 251
joint interests 254
joint ownership 252
other interests 255
request for payment 257
return of premium 256
See Theft Insurance

TRANSFER.
mutual associations 965
of title 101

TRANSFER OF CAR.
change of interest, title or possession 232
failure of agent to change policy 558
title 101
waiver and estoppel 101

TRANSPORTATION INSURANCE.
derailment 764
elevator 763
exclusion clauses 766
transportation of goods or merchandise 766
illustrations 762
ferry boat 762
in general 761
transit policy 765

TRUST DEED.
satisfied before loss 225

U.

UMPIRE.
substitution of 460

UNCONDITIONAL AND SOLE OWNER.
See Representations and Warranties; Title and Ownership; Waiver and Estoppel.

UNCONDITIONAL OWNERSHIP.
instructions 276
waiver and estoppel 99, 100
See Title and Ownership; Unconditional and Sole Owner.

[References are to sections.]

UNEARNED PREMIUM. SECTION.
repayment 337

UNKNOWN.
intent to steal 591

UPSETS.
See Collision Insurance.

USE AND COVERAGE.
collision insurance 705

"USE AND OPERATION OF VEHICLES IN INSURED'S BUSINESS".
construed 907

"USE AT TIME OF ACCIDENT".
construed 896

"USE BY HIMSELF".
construed 911

USE OF INSURED CAR.
description 188

"USE IN PUBLIC SERVICE".
construed 906

V.

VALID.
loss from confiscation 753

VALID AND BINDING.
notice and proof of loss provision 393

VALUE.
recovery of automobile 652
See Valued Policies.

VALUED POLICIES.
appraisal 328, 462
construction, misdescription of age of second-hand automobile a breach of warranty 323
depreciation 576
evidence 327
fraud will avoid policy 322

[References are to sections.]

VALUED POLICIES.—(Continued). SECTION.
illustrations ... 320
liability insurance ... 899
open or valued policies ... 319
pleading and practice ... 329
admission, total loss ... 330
election ... 329
representation as to cost of car ... 142
three-fourths value ... 324
construed ... 325
Missouri statute ... 324
validity ... 321
vexatious refusal to pay ... 326

VENDOR.
conditional ... 741
negligent ... 490

VENDOR AND VENDEE.
"as their interests may appear" ... 755
mortgagee interest ... 305

VENDOR IN POSSESSION.
cancellation ... 340

VERBAL AGREEMENT.
as affecting warranty of encumbrance ... 230

VERDICT.
motion for judgment notwithstanding ... 129
of jury ... 548
See Jury; Procedure.

VEXATIOUS REFUSAL TO PAY LOSS.
finding as to ... 670
jury ... 546
temporary use ... 161

VIOLATION OF SPEED LAW.
liability insurance ... 921

W.

WAIVER.
clause construed as to notice of accident or claim ... 820
instructions concerning ... 543
mutual associations ... 969

[References are to sections.]

WAIVER.—(Continued). SECTION.
of appraisal 444-450
of cancellation provision, when property outside of state where contract entered into 344
of condition for settlement, when insurer refuses to defend 881
of defenses 543
of liability, where insurer defends in accordance with by-law 969
of locking device warranty 664-667
payment to mortgagee 306
of notice of accident or claim 832-837
of notice and proof of loss 399, 429
letters 423
of premium 111
of provision against other insurance 216
of provision for other insurance 216
of provision for actual payment of money, when insurer refuses to defend 844
of provision for cooperation by assured when insurer fails to defend 872
of repayment of unearned premium on cancellation 337
of subrogation 499
of unconditional and sole ownership warranty where insurer has knowledge 250-256
of warranties as to title 250
reservation of rights 417
when insurer refuses to defend 879
when special plea not necessary 520
See Estoppel, Representations and Warranties; Title and Ownership; Waiver and Estoppel.

WAIVER AND ESTOPPEL.
application 86
authority of agents 87
chattel mortgage 102
distinguished 84
evidence 103
federal rule 85
forfeitures 88
gratuitous payment 98
jury 104
knowledge 89
imputed 90
notice 91
in general 91
intention to take out additional insurance 92
information secured by general agent 93

[References are to sections.]

WAIVER AND ESTOPPEL.—(Continued). SECTION.
soliciting agent 94
exception 95
parol promise 97
ratification 105
cancellation 106
failure to cancel 107
in general 105
statutory policy 96
transfer of title 101
unconditional ownership 99, 100
sufficiency of complaint 515

WARRANTIES.
See Representations and Warranties.
See Title and Ownership.

WATER AND LAND.
See Collision Insurance.

WIFE.
intent to steal 588

WHEN INSURER REFUSES TO DEFEND.
settlement 879

WILFUL BURNING.
partnership 290

[Total number of pages 650.]